NO. 35690-2-II

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JERRY D. WIATT, JR.,

Petitioner.

THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 01-1-01136-1

HONORABLE GARY R. TABOR, Judge

APPENDICES TO RESPONSE TO PERSONAL RESTRAINT PETITION

FILED UNDER SEAL

EDWARD G. HOLM
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APPENDIX
A

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. DESC: W/M;6'0";165;BRN;BRN DOB: 12/10/73 SID: NONE YET KNOWN; FBI: NONE YET KNOWN BOOKING NO. NONE YET KNOWN Defendant.	NO. 01-1-1136-1 FOURTH AMENDED INFORMATION CHRISTEN ANTON PETERS Deputy Prosecuting Attorney Co-Defendant N/A

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

TRIAL I

COUNT I - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 through June 30, 2001, did engage in sexual intercourse with A.C. (DOB: 8/18/83), when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated.

COUNT II - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 through June 30, 2001, did engage in sexual intercourse with A.C. (DOB: 8/18/83), when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated.

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COUNT III - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3),

In that the defendant, JERRY D. WIATT, JR., in the, State of Washington, on or about June 29, 2001 and June 30, 2001, did aid, invite or cause a minor to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT IV - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, did aid, invite or cause a minor to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT V - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film A.C. (DOB: 8/18/83) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT VI - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film A.C. (DOB: 8/18/83) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT VII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2000 and June 30, 2000, did give or otherwise supply liquor to A.C. (DOB: 8/18/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT VIII - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

In that the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about August 1, 2000, did engage in sexual intercourse with another, to wit: J.M.B. (DOB: 7/27/84), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT IX - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about August 1, 2000, did give or otherwise supply liquor to J.M.B. (DOB: 7/27/84), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

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COUNT X - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about September 1, 2000 through September 30, 2000, did engage in sexual intercourse with H.A.K. (DOB: 9/3/79), when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

or in the alternative:

COUNT X - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

That the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about September 1, 2000 through September 30, 2000, did engage in sexual intercourse with H.A.K. (DOB: 9/3/79), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT XI - UNLAWFUL IMPRISONMENT WITH SEXUAL MOTIVATION, RCW 9A.40.040 and 9.94A.127:

That the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about September 1, 2000 through September 30, 2000, did knowingly restrain another person, to-wit: H.A.K. (DOB: 9/3/79). It is further alleged that this offense was committed with sexual motivation.

COUNT XII - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or December 19, 2000, did engage in sexual intercourse with K.N.H. (DOB: 12/13/83), when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

COUNT XIII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about December 19, 2000, did give or otherwise supply liquor to K.N.H. (DOB: 12/13/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT XIV - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(a)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 12, 2000, did engage in sexual intercourse by forcible compulsion with Z.H. (DOB: 2/2/83), or when Z.H. (DOB: 2/2/83) was mentally incapacitated or physically helpless.

COUNT XV - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 12, 2000, did give or otherwise supply liquor to Z.H. (DOB: 2/2/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

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COUNT XVI - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

That the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about May 1, 2000 through October 1, 2000, did engage in sexual intercourse with another, to wit: R.R. (DOB: 9/25/82), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT XVII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about May 1, 2000 through October 1, 2000, did give or otherwise supply liquor to R.R. (DOB: 9/25/82), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT XVIII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about May, 2000, did give or otherwise supply liquor to E.G. (DOB: 11/16/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

TRIAL II

COUNT XIX - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about July 8, 1999 through July 17, 2000, did give or otherwise supply liquor to A.J. (DOB: 7/7/82), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

TRIAL III

COUNT XX - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT XXI - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT XXII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any

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person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT XXIII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

TRIAL IV

COUNT XXIV - RAPE OF A CHILD IN THE THIRD DEGREE, RCW 9A.44.079

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1999 through March 31, 1999, did engage in sexual intercourse with and was at least forty-eight months older than S.N.W. (DOB: 3/30/84), a person who was at least fourteen years of age but less than sixteen years of age and not married to the accused.

COUNT XXV - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1998 through March 31, 1998, did give or otherwise supply liquor to S.N.W. (DOB: 3/30/84), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

DATED this 21st day of October, 2002.

CHRISTEN ANTON PETERS, WSBA# 23559
Deputy Prosecuting Attorney

Edward G. Holm
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APPENDIX
B

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. DESC: W/M;6'0";165;BRN;BRN DOB: 12/10/73 SID: NONE YET KNOWN; FBI: NONE YET KNOWN BOOKING NO. NONE YET KNOWN Defendant.	NO. 01-1-1136-1 **FIFTH AMENDED INFORMATION** ***(As to Counts XIX - XXV only)*** CHRISTEN ANTON PETERS Deputy Prosecuting Attorney Co-Defendant N/A

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

COUNT XIX - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about July 8, 1999 through July 17, 2000, did give or otherwise supply liquor to A.J. (DOB: 7/7/82), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT XX - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

ARREST WARRANT
( ) WASHINGTON ONLY/CHAIN STATES
(X) WILL EXTRADITE

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COUNT XXI - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT XXII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT XXIII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

XXIV - COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES, RCW 9.68A.090

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1999 through March 31, 1999, communicated with S.N.W. (DOB: 3/30/84), a minor 15 years of age, for immoral purposes.

COUNT XXV - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1998 through March 31, 1998, did give or otherwise supply liquor to S.N.W. (DOB: 3/30/84), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

DATED this 3rd day of January, 2003.

CHRISTEN ANTON PETERS, WSBA# 23559
Deputy Prosecuting Attorney

ARREST WARRANT
( ) WASHINGTON ONLY/CHAIN STATES
(X) WILL EXTRADITE

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APPENDIX
C

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff, v. JERRY D. WIATT, JR., Defendant. DOB: 12/10/73	No.01-1-1136-1 **JUDGMENT AND SENTENCE (JS)** Prison

I. HEARING

1.1 A sentencing hearing was held on March 31, 2003 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on November 13, 2002 by jury-verdict OF COUNTS II, III, IV, V, VI, VII, VIII, IX, X(lesser included), XI, XII, XIII, XIV, XV, XVI, XVII, XVIII of the 4th Amended Information and guilty on January 3, 2003 by guilty plea to counts XXIII and XXIV of the 5th Ameded Information:

	CRIME	RCW	DATE
II	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	June 29, 2001 and June 30, 2001
III	SEXUAL EXPLOITATION OF A MINOR	9.68A.040(1)(b) and 9.68A.011(3)	June 29, 2001 and June 30, 2001
IV	SEXUAL EXPLOITATION OF A MINOR	9.68A.040(1)(b) and 9.68A.011(3)	June 29, 2001 and June 30, 2001
V	VOYEURISM	9A.44.115	June 29, 2001 and June 30, 2001
VI	VOYEURISM	9A.44.115	June 29, 2001 and June 30, 2001
VII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	June 29, 2001 and June 30, 2001
VIII	RAPE IN THE THIRD DEGREE	9A.44.060(1)(a)	August 1, 2000
~~IX~~	~~FURNISHING LIQUOR TO A MINOR*~~	~~66.44.270(1)~~	~~August 1, 2000~~
X	ATTEMPTED RAPE IN THE THIRD DEGREE (Lesser included offense)*	9A.28.020 and 9A.44.060(1)(a)	September 1, through September 30, 2000

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XII	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	December 19, 2000
XIII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	December 19, 2000
XIV	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	February 12, 2000
XV	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	February 12, 2000
XVI	RAPE IN THE THIRD DEGREE	9A.44.060(1)(a)	May 1, 2000 through October 1, 2000
XVII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	May 1, 2000 through October 1, 2000
XVIII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	May, 2000
~~XVIII~~ XXII	VOYEURISM	9A.44.115	January 1, 2000 through July 31, 2001
XXIV	COMMUNICATION WITH A MINOR FOR IMMORAL *PURPOSES	9.68A.090	February 1, 1999 through March 31, 1999

*** GROSS MISDEMEANORS**

2.2 CRIMINAL HISTORY (RCW 9.94A.360): NONE KNOWN

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1						
2						
3						
4						
5						

2.3 SENTENCING DATA:

	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
II.	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
III.	9	IX	120 mo.	N/A	120 mo.	10 yrs
IV	9	IX	120 mo.	N/A	120 mo.	10 yrs
V	23	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
VI	23	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
VII	N/A	G.M.				

VIII	23	V.	5 yrs	N/A	60 mo.	5 yrs
IX	N/A	G.M.				12 mo.
X	N/A	G.M.				12 mo.
XII	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
XIII	N/A	G.M.				12 mo.
XIV	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
XV	N/A	G.M.				12 mo.
XVI	23	V	60 mo.	N/A	60 mo.	5 yrs
XVII	N/A	G.M.				12 mo.
XVIII	N/A	G.M.				12 mo.
XIX	22	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
XXIV	N/A	G.M.				12 mo.

2.4 [X] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above the standard range for Count(s) II, XII, XIV. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did recommend an exceptional sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts I without Prejudice and Counts XIX, XX, XXI, XXII, XXV with prejudice
The defendant is found NOT GUILTY of Counts XI.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

	$ TBD	Restitution to: V's or Families For Any Consequent	
JASS CODE			
	$ _____	Restitution to: Costs Reasonably Related to These	
RTN/RJN			
	$ _____	Restitution to: Offenses	
		(Name and Address--address may be withheld and provided confidentially to Clerk's Office).	
PCV	$ 500-	Victim assessment	RCW 7.68.035
CRC	$ 110-	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
		Criminal filing fee $ 110-	FRC
		Witness costs $ _____	WFR
		Sheriff service fees $ _____	SFR/SFS/SFW/WRF
		Jury demand fee $ _____	JFR
		Other $ _____	
PUB	$ _____	Fees for court appointed attorney	RCW 9.94A.030
WFR	$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM/MTH	$ _____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/FCD NTF/SAD/SDI	$ _____	Drug enforcement fund of _____	RCW 9.94A.030
CLF	$ _____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
EXT	$ _____	Extradition costs	RCW 9.94A.120
	$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$ 100 -	Other costs for: DNA FEE	
	$ _____	TOTAL	RCW 9.94A.145

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing:
[X] shall be set by the prosecutor
[ ] is scheduled for _____

[ ] RESTITUTION. Schedule attached, Appendix 4.1.

[ ] Restitution ordered above shall be paid jointly and severally with:.

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-$)
RJN			

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____ . RCW 9.94A.145.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [X] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with those person listed below including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE.

4.4 **OTHER:** _____

_____

_____

4.5 **JAIL ONE YEAR OR LESS.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

328	months on Count	II	328	months on Count	XII
120	months on Count	III	12	months on Count	XIII
120	months on Count	IV	328	months on Count	XIV
12	months on Count	V	12	months on Count	XV
12	months on Count	VI	60	months on Count	XVI
12	months on Count	VII	12	months on Count	XVII
60	months on Count	VIII	12	months on Count	XVIII
12	months on Count	IX	12	months on Count	~~XIX~~ XXII
12	months on Count	X	12	months on Count	XXIV

Actual number of months of total confinement ordered is: _____

All counts shall be served concurrently, except for the following which shall be served consecutively: **The sentences imposed on the gross misdemeanor counts shall be served concurrently with each other but consecutively to the sentences imposed on the felony counts.**

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Confinement shall commence immediately unless otherwise set forth here:_____

_____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. **The time served shall be computed by the jail. The credit for time served in the Thurston County Jail shall be first applied to the Gross Misdemeanor counts and any remainder to the Felony counts.** The defendant shall receive credit for all time on electronic home monitory.

4.6 **COMMUNITY CUSTODY.** RCW 9.94A.120. Defendant shall be placed on community custody for **LIFE** as part of the exceptional sentence imposed. Defendant shall report to DOC after release from custody; and the defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC and shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community custody and any other conditions of community custody stated in this Judgment and Sentence or other conditions imposed by the court or DOC during community custody. The defendant shall:

While on community community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: Any Victims or Immediate Family Members

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:_____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions:_____

_____

[X] **Abide by all requirements in the attachement incorporated herein.**

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

Other conditions: _____

_____

_____

_____

The community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.400.

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4 **RESTITUTION HEARING.**

[X] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.7 **SEX OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the

sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 **BAIL:** Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

5.9 **OTHER:** _____

_____

_____.

DONE in Open Court and in the presence of the defendant this date: _____.

JUDGE Gary R. Tabor

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
Jon Tunheim, WSBA #19783	David Allen, WSBA #500	JERRY D. WIATT, JR.
Deputy Prosecuting Attorney	Attorney for Defendant	
Christen Peters, WSBA #23559	Todd Maybrown, WSBA #18557	

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the

_____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATION

CAUSE NUMBER of this case: 01-1-1136-1

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. (If no SID take fingerprint card for State Patrol)

Date of Birth 12/10/73

FBI No.

Local ID No. C104581

PCN No. **008076928**

Other _____

Alias name, SSN, DOB: _____

Race:

[X] Asian/Pacific Islander [ ] Black/African-American [X] Caucasian [ ] Native American [ ] Other: _____

Ethnicity:

[ ] Hispanic [X] Non-Hispanic

Sex:

[X] Male [ ] Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court:, Deputy Clerk. _____ Dated: 3-31-03

DEFENDANT'S SIGNATURE: _____

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff,

vs.

Jerry D. Wiatt Jr, Defendant.

No. 01-1-01136-1

CONDITIONS OF COMMUNITY CUSTODY/~~PLACEMENT/SUPERVISION~~
Attachement to Judgment and Sentence

The court orders the following conditions of the Community Custody/Placement/Supervision:

- [X] NO CONTACT WITH VICTIM(S) FOR LIFE
- [X] No criminal law violations;
- [X] Obey all rules of D.O.C.;
- [ ] No contact w/ minors unless supervised by an adult who has been approved by your CCO/Therapist;
- [ ] Do not enter into a relationship with any person who has minors in their care or custody without approval of your CCO/Therapist;
- [ ] Hold no position of authority or trust involving minors or participate in any youth programs;
- [ ] Drug /Alcohol abuse treatment as required by CCO;
- [ ] Domestic Violence treatment as required by CCO;
- [X] Sexual Deviancy Treatment as required by CCO;
- [ ] Not possess or peruse any sexually explicit material as defined by therapist/CCO;
- [ ] Stay out of business establishments offering sexually explicit material or entertainment;
- [ ] Not frequent or loiter in areas where children congregate;
- [ ] Do not access the Internet or make use of any computer modem;
- [X] No Possession or Consumption of controlled substances unless by Lawful Prescription. Submit to random urinalysis and reasonable searches as required;
- [ ] Not consume alcohol, and random breath testing as required;
- [X] Notify any employer of your conviction and rules of supervision and/or treatment;
- [X] Mandatory HIV Test;
- [X] Mandatory DNA Testing;
- [X] Mandatory Sex Offender Registration;
- [X] Submit to polygraph as required by therapist or CCO to monitor compliance with sentence;
- [ ] Submit to Plethysmograph testing as required by therapist or CCO
- [X] Living conditions to be approved by CCO;
- [X] Geographical Restrictions as ordered by CCO;
- Abide by all other reasonable rules of supervision imposed by your CCO.
- [X] Other: IF D IS IN THERAPY, HE MUST ABIDE BY ALL RULES OF THERAPY AS REQUIRED BY THE THERAPIST.

DATED: 5-31-03

I acknowledge that I have read and understand the conditions listed above.

DEFENDANT

JUDGE

SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff,	No. 01-1-1136-1
vs.	**WARRANT OF COMMITMENT**
JERRY D. WIATT, JR., Defendant	

DOB: 12/10/73
SID:
BOOKING # _C104581

SEX: Male
RACE: White/Asian

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections,

The defendant herein has been convicted in the Superior Court of the State of Washington for the crime(s) set forth in the judgment and sentence under the above entitled cause and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the aforementioned Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATED: 3-13-03.

By direction of the Honorable:

BETTY J. GOULD, CLERK

By: _____
Deputy Clerk

APPENDIX
D

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 01-1-01136-1
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	DECLARATION OF JAMES C. POWERS RE TRANSCRIPT OF INTERVIEW WITH AMANDA CHINN

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

James C. Powers declares and affirms:

I am a Deputy Prosecuting Attorney for Thurston County, Washington, representing the Plaintiff, State of Washington, in the above-entitled cause. Attached is the complete transcript of a taped interview conducted by Thurston County Sheriff's Detective Louise Adams with witness Amanda Chinn on July 26, 2001. This transcript was part of the discovery provided prior to the trial of the above-entitled cause.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge

DATED and signed this 8th day of May, 2007, in Olympia, Washington

James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 7-26-01
Time: 1607 hours

NAME: CHINN, AMANDA J.

DATE OF BIRTH: 12-15-83

ADDRESS: P. O. Box 11281
Olympia, WA 98502
Phone: 866-7265

INTERVIEWING OFFICER: Det. Adams, TCSO

INTERVIEW LOCATION: TCSO

ALSO PRESENT:

Q. Amanda when we talk today, I'm gonna use a tape recorder to record our conversation. Is that with your consent?
A. Yes.

Q. Why are you in my office today Amanda?
A. Because one of my friends got raped by Jerry Wiatt.

Q. Okay. And what friend is that?
A. Jennifer Bowles.

Q. Can you tell me when that happened?
A. Um I think it was around two years ago.

Q. Okay.
A. I mean, I think so.

Q. Okay. How old was uh Jennifer at the time?
A. I think 14.

Q. Okay. Alright. I want you to think back to that eve-... or day or evening and tell me everything your remember.
A. I remember I got there um I think we were the only two girls and then um...

Q. Okay, where is there?
A. At Sadronna, his house. Jerry Wiatt's house in Sadronna.

Q. Okay in the Sadronna development?
A. Yea.

Q. Okay. Sometimes dates are kind of hard and tricky on people.

A. Mm-hmm.

Q. Do you remember how old you were when that happened?
A. I was 15.

Q. How old are you now?
A. 17.

Q. Okay. And do you remember if it was in the summer, in the fall, during school year?
A. I think it was during the school year in the fall.

Q. Okay.
A. May-...I don't know.

Q. You don't know.
A. Uh-uh.

Q. And it's okay not to know. If you, if you don't know and you're not sure, that's fine. Okay. Tell me what you remember.
A. I remember um we got there and then he like gave us some drinks and stuff and then we were drinking um...

Q. How did you get there?
A. He picked us up from Jennifer's house, I think it was like 12:30 at night.

Q. Okay.
A. We called him. Um, he picked us up and um then when we got there, we were drinking but I didn't feel like drinking so I was on the couch um watching TV um and it was just, I think it was like us three there in the other roommates were sleeping or gone. And he...I remember Jennifer was sitting on the counter. He was just giving sh-...her shot after shot of I think B-52's or something like that.

Q. Okay.
A. Um he offered me some but I said no. Um I kind of fell asleep on the couch and they went upstairs. Um I didn't hear anything but afterwards she dropped us all off um...

Q. What do you mean she dropped us off?
A. Or he dropped us off to Jennifer's house. And then um Jennifer, I mean I asked her what happened. She didn't really say anything. It took her a while but then she finally told me that he got her drunk and um she didn't know what she was really doing or what he was doing to her but she knew that she had sex with him and I don't know. It...I mean it just affected her.

Q. Okay.
A. Like...

Q. How's it affected her?
A. It just, she feels really gross about herself. She thinks it's her fault. She um I don't know. It's just and everyday thing she lives with, you know. And ...

Q. Did she tell you um or use the term rape?
A. I think she did.

Q. Okay. Did she tell you if she fought him off or she told him no or anything like that?
A. No she didn't tell me that.

Q. Okay. Alright. And um why didn't she go to the police? Did you guys talk about that or anything?

A. We did talk about it. Um we heard that Jerry had raped another girl. Her name, I think is Sherry. We heard about that in school. No this is after it happened. Um we never really thought of going to the police just because we didn't want to get involved anyth-...like in anything. We didn't want like our parents to know...

Q. Right.
A. And like so um we just, I don't know.

Q. When I talked to Jennifer, she told me that this happened last summer, like at...
A. Last summer?

Q. ...at the end of last summer.
A. Mm-hmm. Well it's like our first time ever meeting Jerry was our freshman year.

Q. Okay.
A. Um I remember I was I think 14 years old. Um I...I don't know. We hung out with his brother Jeff Wiatt and we went to his house and I remember they get...I just...they just made me one drink after another and I've had a ...I was puking all night. I man Jeff cam in and asked me if I wanted to have sex with someone or he aah-...he used the terms do you want to get laid. And he was referring that to Jerry. And I said no, you know, and nothing happened that night. We just ...but that was in a different house in Lacey.

Q. Okay.
A. But it's just since the...that was the first night ever meeting Jerry and then just we've, I don't know.

Q. That night when um Jennifer and Jer-...you were on the couch and they went upstairs.
A. Mm-hmm.

Q. How drunk was Jennifer?
A. She was pretty drunk.

Q. Okay, describe pretty drunk.
A. She, I don't think she really knew like the things, you know, just little by little she could remember, like...

Q. Was she slurring her words, was she stumbling? I mean how did you know she was intoxicated?
A. She was...she was stumbling. Um I...I mean I know how much Jennifer can take, you know, just...I don't know she drank a lot. Um...I don't know. Um...like I said, I was on the couch. I was...

Q. Okay.
A. But...

Q. Did Jennifer, as far as you know, ever go back to Wiatt's residence after that?
A. Mm...yes.

Q. Okay. She told me she'd...she never went back after that. How sure are you?
A. Not very sure. Um, I don't know. Um, I know that...I don't know. I think oh, see I don't know when the last time we did go back there. I mean it was together, I know that. Um...but there's been other times that we went over there, but um we did go over there and Jerry wasn't there. He was away and um I don't know, but we're friends with other people that lived there.

Q. Right. Would Jennifer lie about something like this?
A. I don't think so.

Q. Would she make something like this up?
A. No.

Q. Would she have any reason to?
A. No.

Q. Okay. And after she told you this happened with Jerry, notice a change in her behavior?
A. Yea. Because...I don't know. She just, she just doesn't feel right about herself. It's made her self esteem like really low.

Q. Okay.
A. I...

Q. How did you hear about what happened with Sherry?
A. A friend, Haley told me.

Q. Okay.
A. Well, and other people from um school. It was just around the school.

Q. Okay. Do you know of any other people that maybe Jerry Wiatt did this to?
A. I don't know 'em personally, but I have a friend TaLeah that I work with and she um...she named three people plus seven other people that might know anything else.

Q. Okay.
A. And she's...I'm able to (mumbles - unintelligible) today, so...

Q. Okay. Is there anything else, Amanda, that um I need to know about concerning Jerry Wiatt, that we haven't talked about today?
A. I don't think so. I...

Q. Okay. Have you ever heard about any video taping or anything like that?
A. Yea, yea.

Q. What have you heard about that?
A. I heard that um that there's a video tape of girls like all passed out and he's just going one to another and they don't even have a clue what's going on.

Q. How did you hear that?
A. I heard that um from a friend who heard it from another friend.

Q. Okay. You never seen a video tape?
A. I never seen a video tape.

Q. You ever seen any video um recording of (unintelligible) in his house?
A. Mm...no, I don't think so.

Q. Okay.
A. I don't know.

Q. Okay. Is um...h-...has Jerry ever touched you in a way that made you feel uncomfortable?
A. No.

Q. Okay. Um anything else you'd like to add to this statement at all? Anything?
A. No.

Q. Is everything you told me today true and correct to the best of your knowledge?
A. Yep.

Q. At any time since we've been talking, have you asked me to turn off the tape recorder?
A. No.

Q. I'm gonna conclude this statement.

ENDING TIME: 1617 hours

APPENDIX
E

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 01-1-01136-1
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	DECLARATION OF JAMES C. POWERS RE TRANSCRIPTS OF INTERVIEWS WITH ERIN GUNDLACH

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

James C. Powers declares and affirms:

I am a Deputy Prosecuting Attorney for Thurston County, Washington, representing the Plaintiff, State of Washington, in the above-entitled cause. Attached are complete transcripts of two taped interviews conducted by Thurston County Sheriff's Detective Louise Adams with witness Erin Gundlach on August 3, 2001. These transcripts were part of the discovery provided prior to the trial of the above-entitled cause.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge

DATED and signed this 8th day of May, 2007, in Olympia, Washington

James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 8-3-01
Time: 1330 hours

NAME: GUNDLACH, Erin E.

DATE OF BIRTH: 11-16-83

ADDRESS: 707 Nash Hall
Western Washington University
Bellingham, WA 98225
Call Phone (available in September): 360-788-8228

INTERVIEWING OFFICER: Det. Adams, TCSO

INTERVIEW LOCATION: Telephonically

ALSO PRESENT:

Q. Erin when we talk today, I'm going to use a tape recorder to record our conversation. Is that with your consent?
A. Yep that's fine.

Q. Erin do you know a young lady by the name of Zoe Hotkins?
A. Yes I do.

Q. And um what kind of relationship do you have with Zoe and how long have you known her?
A. We've been friends since about 6th grade, so about um 7 years.

Q. Okay.
A. And we are fairly good friends; pretty good friends, yea.

Q. Okay. And how old are you now?
A. I'm 17.

Q. Okay. On or about February 12th, 2000 uh do you recall attending some type of school event with Zoe?
A. Um yea I actually um I yea I…she was at Capital High School at a um think a choi-…or a band thing.

Q. Mm-hmm.
A. She was playing the clarinet, something and I was with Jeff Wiatt…

Q. Mm-hmm.
A. And we came and picked her up about I think it was around either 9…I think it was 9:00 or 7:00, we picked her up from Capital and um we…I'm not…I don't really remember what we did right after that, but sooner or later we ended up at um Jeff's house which is uh he lives with his brother, Jerry.

Q. Mm-hmm.

A. And then there was another…there were several other guys there and there was like a couple other people there.

Q. Okay. When um they picked you…when you picked Zoe up…
A. Mm-hmm.

Q. …who was driving?
A. Jeff.

Q. Okay. And what was he driving?
A. He was driving um his old Honda…is it 2001 Honda Civic.

Q. Okay. And that's Jeff Wiatt?
A. Yea.

Q. And eventually you and Zoe and Jeff went back to his residence?
A. Yea.

Q. And Jeff lives with his brother Jerry Wiatt?
A. Yea.

Q. Do they live in the Sodronna development, or do they live somewhere else?
A. Sodronna.

Q. Okay. And um what time do you figure you got to the house?
A. Oh I…no later than maybe like 10.

Q. Okay. And did you girls have a curfew or plans for what you were going to do that night?
A. We were going to stay at Zoe's house.

Q. Mm-hmm.
A. So we were going to hang out for a while there um with Jeff 'cuz I didn't even know anybody else that lived there. I just knew Jeff and so we were going to hang out with him. And then like have him take us home 'cuz neither of us could drive then.

Q. Okay.
A. So.

Q. When you got to the residence…
A. Uh-huh.

Q. …were…was it just you three then?
A. No.

Q. Okay. Who was there?
A. Uh me, Jeff, Jerry, um Zoe, a guy named Kevin, um another guy named Ryan, I think, who used to live there but he moved out. And I think there was a couple of other girls there, but I think they were leaving.

Q. Okay.
A. So I didn't really talk to anybody else.

Q. Is that the first time that you had ever gone to the Wiatt residence with Zoe?
A. Yea.

Q. Okay. Did Zoe ever go to the Wiatt residence after that?

A. No.

Q. Okay. Um when you got to the residence, what was going on? What did you do?
A. Um we went inside and like sat around. They had a pool table in there and we like...like I think we like just played around with that for a little while and then we went to the kitchen and I...I believe that we like...we like ate some chips or crackers or something that was out and then um they were all drinking.

Q. Mm-hmm.
A. All the guys were drinking there, so Jerry offered to make us drinks and um and there was like beer and everything and so um I...I didn't have a drink from Jerry. I don't recall that Zoe did right then.

Q. Mm-hmm.
A. But I...I know we started drinking beer.

Q. Okay.
A. So we...we just kind of like sat in the kitchen talked and stuff and there was um the TV's like by the kitchen and so we like were watching TV and stuff.

Q. Mm-hmm.
A. But just kind of like hanging out.

Q. Right.
A. But talking and stuff.

Q. Okay. Zoe is drinking beer?
A. Yea.

Q. Okay. And then what happens?
A. Um I, let's see. Okay, I was with Jeff and she...Jerry had start talking to her and like...but we were just...everyone was pretty just (sounds like) downstairs and just hanging out and like I remember going into the other, the TV room with Jeff and we're sitting on the couch and talking and Zoe was still in the kitchen from what I remember.

Q. Mm-hmm.
A. And then I just like, Jeff and I went out into the hot tubs.

Q. Mm-hmm.
A. And Zoe went upstairs with Jerry.

Q. Okay.
A. And I don't re-...'cuz I wasn't with her the whole time.

Q. Did you see her go upstairs with Jerry?
A. Yea.

Q. Okay.
A. Like I...I remember her like being down...I remember her being downstairs and then I remember her not being down there and I remember me like...and I remember like going upstairs.

Q. Mm-hmm.
A. And then I remember him and her in his room. And I remember I was saying Zoe and like I...I think that like...I don't remember, I just like remembered saying Zoe.

Q. Mm-hmm.
A. Like to the door and like then just did stuff (sounds like) I went downstairs and went in the hot tub.

Q. Okay. So...
A. So...

Q. Are you in the hot tub and then you go up and find Zoe?
A. No that was before we went in the hot tub. 'Cuz I went upstairs to change.

Q. Okay. So, and when you went upstairs to change, where was Zoe?
A. She was with Jerry, I believe in his room.

Q. Okay. And was the door open or shut?
A. It was shut.

Q. Okay. And was it locked or unlocked?
A. Locked.

Q. Okay. And how do you know that?
A. Because I tried the door when I was saying Zoe.

Q. Okay. And why were you saying Zoe at the door?
A. 'Cuz I didn't know where she was. I didn't...I...I mean I knew she was up there, but I didn't know what she was doing. I didn't know if she was even okay because I di-...I never met Jerry before.

Q. Mm-hmm.
A. I didn't...I mean he seemed like a nice guy.

Q. Mm-hmm.
A. So I didn't know.

Q. Okay. Were you worried about her?
A. Yes.

Q. Okay. And when you said Zoe at the door, there was no response?
A. Um not...I don't, I don't really remember. I mean...

Q. Okay.
A. I think that like Jerry had said go away or something and I thought maybe they were just like, I don't, you know, I thought everything was fine; that I should just leave them alone.

Q. Okay. And so then you went and you hot tubbed with Jeff?
A. Yea and Kevin was out there too. We were just talking and stuff and out there.

Q. Okay. And then what happens?
A. Then...well the three of us are down there just talking and Zoe comes running outside and she's like, Erin we need to leave. And she's like Erin, come on, we need to leave. And like I've known Zoe for a long time and sometimes she like gets kind of like out of hand.

Q. Mm-hmm.
A. So I didn't know. I think I thought maybe it was just something stupid and I was just like, what's wrong. And she's like, I don't want to talk about it, I want to leave. And I was like, well...I was like well, what's wrong, you know, I...I kept asking her and she's like, I need to leave, I need to leave. And so when Jerry comes downstairs and he was mad and I don't know why, but he was like, you guys need to leave.

Q. Okay.

A. And so Zoe went in the house and she got her shoes on and like she went out front 'cuz like no one would take her home because like we c-...I couldn't...I didn't have a car. Jeff had been drinking. He wasn't gonna drive and I don't remember why Kevin couldn't. But then Jerry just wanted us to leave.

Q. Okay.
A. And so she went out in the front and I think she grabbed um Jeff's cell phone.

Q. Mm-hmm.
A. And like I think she tried to call some of her friends or something.

Q. Mm-hmm.
A. But I'm not sure. And like so we were out in the back so...'cuz I still hadn't no idea what was going on. I wasn't like completely there...

Q. Mm-hmm.
A. ...so I didn't know what was going on. And um...so she came back and finally Kevin said that he'd take her home.

Q. Okay.
A. And so...

Q. And this is Kevin who?
A. Kevin Barlow.

Q. Okay.
A. And so um finally it was like 2:00 in the morning, probably.

Q. Mm-hmm.
A. And she like totally been freaking out and I was like Zoe come, please talk to me, you know, and ...and like. And Jeff was like, okay, well Erin I'll take you home in a little while. And so like Zoe went with Kevin and then I ended up staying there that night.

Q. Mm-hmm.
A. And like Zoe went home and then she called me the next morning and um...actually I went to the mall 'cuz she had a colored stand thing.

Q. Mm-hmm.
A. And I picked up the...her Jeff's phone from her.

Q. Mm-hmm.
A. And I brought it back to Jeff the next day and she had told me what happened and so...

Q. What'd she tell you had happened?
A. She told me that um she had gone upstairs with Jerry or somehow she'd gotten up there and that he wanted her to like...he was making them drink.

Q. Mm-hmm.
A. And that she...it was weird, from the second that...the next day she told me she thought he put something in her drink...

Q. Mm-hmm.
A. ... and she's always said that like from then on.

Q. Mm-hmm.

A. And um she said that he was making two drinks and that he poured...she watched him and she poured...he poured um one drink...or he poured like some kind of liquor into two glasses. Then he took something else and put it into one glass.

Q. Mm-hmm.

A. And she said that...to him that she wanted the other glass and that he was like no, no this is your drink, you know, the one that she didn't want. And so I guess she finally she drank something later. I don't know what it was but she was passed out and he...she said that he raped her or that he forced her to have sex with um him and she didn't want to. And so finally she like got off or she got away from her and she went outside and he said that like if w-...you ever came back, that he would like hurt her or she wasn't allowed in his house or something and she just wanted to leave and, I don't know.

Q. Okay. Did you ever hear him saying that?

A. No.

Q. Okay. But he was mad.

A. Oh yea. We, like...'cuz I remember Jeff asking him, Jerry what's wrong, what's wrong. And he's like nothing, nothing. They just need to leave.

Q. Mm-hmm.

A. So.

Q. Okay. Um and uh after she tells you that the next day, then what happens?

A. Um I...I was kind of ...I wasn't really dating Jeff, but I was kind of like.. I went out (unintelligible) seeing him, I guess.

Q. Uh-huh.

A. And so like I talked to him and I um like, I don't know like we kind of talked and he was like, well I don't know. 'Cuz he wasn't there either and I...I...I didn't really, I don't know. Like I was mad, but I didn't know what to do.

Q. Mm-hmm.

A. So I...I talked to him about it and like he, he knows, you know. Like I...I still talk to him and he knows about it.

Q. Mm-hmm.

A. But I didn't know what to do about it. I didn't, you know, I just ...'cuz Zoe and I just kind of like let it go.

Q. Mm-hmm.

A. We didn't know what to do and I don't know.

Q. What did Jeff think about what had happened?

A. He...he's like said, he's, you know, my brother does really stupid things and he's like I feel really bad about it and I'm really sorry but I, you know, I...I don't know. He just said he didn't...didn't help that I guess but I don't know.

Q. Okay. And um you guys decided not to call the police?

A. Yea.

Q. Okay. Why was that?

A. Um I don't know. I don't think it really ever...I don't...I...personally I was kind of scared. Like I didn't know really what had happened and it was kind of like a shock to me.

Q. Mm-hmm.

A. I was kind of...I guess I was in shock 'cuz I didn't know...I...I mean I was stupid. I was like 16, I have no idea. I'm not saying I'm like smart now, but like then I...it's like oh, you know I thought that Jeff Wiatt was so cool and I was just like well I think it's cool hanging out with him and Zoe and I just...I don't know, I just don't think that we really thought about it.

Q. Okay. Um when I talked to Zoe.
A. Mm-hmm.

Q. And I've...I've talked to a lot of girls so sometimes I get confused, but...
A. Mm-hmm.

Q. ...when I talked to Zoe, um she pretty much tells the same story you do.
A. Mm-hmm.

Q. But I...I believe that she told me that when you guys got to the residence there.
A. Mm-hmm.

Q. That there wasn't anybody else there.
A. Oh really?

Q. But that Jeff made a phone call to Jerry and then Jerry came home and that's when the other people showed up.
A. Oh.

Q. How does...does that make any sense to you?
A. Well, actually yea because that...okay, yea. That...'cuz see I...I don't know. I been over there a couple times after that too.

Q. Mm-hmm.
A. So like I don't...

Q. Okay.
A. ...in fact, yea, 'cuz that does make sense to me because I remember when we went there that um Jeff parked in the driveway and Jerry parked ... uh like in front of where Jerry parks in the garage.

Q. Mm-hmm.
A. And so I remember Jeff having to move his car.

Q. Okay.
A. But I thought that Kevin was there when we got there. I d-...I guess I just...I don't ...it was a long time ago. I don't remember.

Q. Okay. So you're just not sure.
A. Yea.

Q. So, and...and correct me if I'm wrong here because I...I do get things confused. You're...you're recollection now is who was at the house when you got there?
A. I think Kevin was there. But I'm not...I'm just not sure.

Q. And Jerry?
A. No. I...I've...I...I don't know. I thought he was, but that's just kind of like a ... I'm not sure.

Q. Okay.
A. I'm not sure.

Q. Alright. Do you remember Jeff being on the phone with Jerry or anything like that?
A. Um I remember him being on the phone a lot right when we first got there. So maybe he was...yea that might have been he was calling Jerry 'cuz I just don't, but yea...I...he was on the phone...

Q. Okay.
A. ...when we first got there.

Q. Do you recall anybody making any comments about what you girls looked like or anything like that into the phone?
A. Um no.

Q. Okay. C-...Zoe told me something about Jeff making a comment um to Jerry on the phone about her having big boobs.
A. Oh yea, I believe it.

Q. Did, but did...do you remember hearing anything like that?
A. No.

Q. Okay. Alright. I don't want to put words in your mouth.
A. Yea.

Q. Um, you know, I'm...but I'm just recalling what Zoe told me...
A. Yea.

Q. ...and I'm trying to see if it fits.
A. Yea. Yea.

Q. Okay.
A. Yea.

Q. Um she told me that um after drinking some beer she just really got tired. Do you remember her being tired or complaining of that?
A. Yea, yea.

Q. What do you remember about that?
A. Um well when we were in the other room and she was in...she was in...like I think she was still in the kitchen, she was just kind of like, like there and she was just kind of like, oh I'm really tired like uh...like I...I remember her saying that I think she wanted to go home.

Q. Okay.
A. Like earlier.

Q. Uh-huh.
A. Than when we had planned on going home. And I...but I was just so like not...I wasn't really paying attention because I was, you know, I was ha-...having fun, so...

Q. Right. When she's complaining about being tired, do you...can you think of who might have been in the house then?
A. Um I'm pretty sure that everybody was there then.

Q. Okay.
A. Ou-...Kevin, just me, her and Jerry.

Q. Okay. Alright. And um...alright. Um now as far as...I, I know you went out in the hot tub with Jeff and so you're away from where Zoe was at.

A. Yea.

Q. But um are you absolutely sure you saw her going upstairs with Jerry?
A. I wouldn't say I'm 100% sure.

Q. Okay. Could it have happened a different way?
A. Um, yea.

Q. Okay. Alright. But you do know that when you um came upstairs, she was in Jerry's room…
A. Yes.

Q. …and the door was locked?
A. Yes.

Q. Alright. But you're not 100% positive how she got up there?
A. No.

Q. Okay. Alright. Um Erin is there anything else uh about that incident or that night that you'd like to add to this statement?
A. Um…

Q. Anything else you can think of?
A. Not really.

Q. Okay. Is everything you told me today true and correct to the best of your knowledge?
A. Yes.

Q. Okay. Have I in any way forced you or coerced you or made you any promise or threatened you in any way?
A. No.

Q. Um while we've been talking, have you asked me to turn off the tape recorder?
A. No.

Q. Okay. And everything you've told me is true and correct to the best of your knowledge?
A. Yes.

Q. I'm going to go ahead and conclude this statement.

ENDING TIME: 1345 hours

Thurston County Sheriff's Office

☐ Suspect
☒ Victim
☐ Witness

Case #: 01-24273-07
Date: 08-03-01
Time: 1636

NAME: Gundlach, Erin E

DATE OF BIRTH: 11-16-83

ADDRESS: 2010 Lenox Ct, NW
Olympia, WA 98502
705-0627

INTERVIEWING OFFICER: Det. Adams

INTERVIEW LOCATION: Thurston County Sheriff's Office

ALSO PRESENT:

Q. Erin, when we talk today, I'm gonna use a tape recorder to record our conversation. Is that with your permission?
A. Yes.

Q. Erin, why did you come see me today?
A. Because I was raped by Jerry Wiatt.

Q. Okay. When did that happen?
A. Um, or, um, May 6th, I believe.

Q. Of what year?
A. 2000.

Q. And where did that happen?
A. At his house.

Q. And where is his house?
A. Cedrona.

Q. Is that a housing development in.....
A. Yeah.

Q. ....Thurston County?
A. Yeah.

Q. I would, did it happen during the day or at night?
A. At night.

Q. Okay. I want you to think back and tell me everything you remember about that night, how you got there, who you got there with, everything.

A. Okay. I was at my friend's house, um, and a whole bunch of us were just hanging out over there. And, um, three of, or myself and my friend, Mindy and my friend, Sarah, decided to go over to the Wiatt's to see Jeff.

Q. And, and who is Jeff?
A. Jeff is Jerry's younger brother and my friend, or used to be my friend.

Q. What's Mindy's last name?
A. Bouivier, b-o-u-I-v-e or I-e-r. I'm sorry.

Q. Try that again.
A. b-o-u-v-I-e-r. Yeah.

Q. And Sarah's last name?
A. Morris, m-o-r-r-I-s.

Q. Okay. And so you guys decide to go over to the Wiatt residence in the Cedrona development to see Jeff, which is Jerry's brother?
A. Yeah.

Q. Okay. And how do you get there?
A. Um, Mindy drove.

Q. Okay.
A. And, uh, it was pretty late. It was probably like two o'clock in the morning (unintelligible). And we went over there. And when, uh, we got there, Jeff and three girls were leaving. So, I didn't get to talk to him because he left. And so, uh, Mindy went upstairs, she went with Kevin Barlow.

Q. Mm hmm.
A. She went upstairs with him. So she was, that was all I saw of her that night. Because she was up there. And, um,...Sarah and I like hung around downstairs with Jerry and this other guy I've never seen before. I don't even know his name. And like played pool. And then Jerry said he'd make us some drinks.

Q. Okay. How old were you?
A. I was sixteen.

Q. Okay. And did he make you some drinks?
A. Yeah.

Q. And what did you drink?
A. Um, it was something with, it was red and it had like takeray or something in it.

Q. Tangaray?
A. Yeah.

Q. Okay.
A. I don't know what else. And then, um, it took him like a long time to make them. And I just didn't, I was just like, okay, because I don't know. He was like busy over in the kitchen, making us drinks and...

Q. Making drinks for you and, and Sarah?
A. Sarah, yeah.

Q. Okay.
A. And then he brought them over and...I remember taking a drink and I probably had like half a glass. And I felt really tired and like really just out of it. And I didn't know, I just was not knowing what was going on.

And then, um, the next thing I knew, I was in his room. But, I don't know how I got there. I do not remember walking up those stairs to go to his room.

Q. Okay.
A. Um, then I remember him showing me like something on the Internet, on his laptop in his room. Like he has a business, he showed me their web site. And then I remember him showing me his bathroom and like he had all these candles and like a bath, big hug bath tub. And then I remember him giving me a back massage. And then I remember Sarah coming in the room. And then like, um, she was just like talking to us. We're all (sounds like), and then he made her leave, I think, and he locked the door.

Q. How did he make her leave, do you know?
A. He asked her to leave and…

Q. Okay.
A. …she went downstairs. And I, and she was downstairs with that other guy. They were just like playing pool or something.

Q. Mm hmm.
A. And, um, we were in his room. And he like, I think I had my, I don't really remember. But, I think I had my shirt up, because he was giving me a back rub. And then I remember him like getting out a condom. And I remember him putting it on. And then I don't remember anything after that. And then I remember waking up and I didn't have any clothes on and he was next to me.

Q. Okay. Then what happens?
A. Then Sarah came in at like seven o'clock in the morning. She was banging on the door. And she was yelling, like "Erin, Erin, we need to leave." And so, um, I woke up and I was real groggy. And like, I unlocked the door. And then me, we got, Sarah and I went out and went and got Mindy out of Kevin's room and then we left. And I went over back to my friend's house and I was sick all day. I puked all day long and I just felt awful all day long.

Q. Which friend's house did you go back to?
A. Um, Nathan.

Q. Okay. And what's Nathan's last name?
A. Nathan Cant, c-a-n-t.

Q. Okay. And you were sick all that day?
A. Yeah.

Q. Okay.
A. I just slept like at his house and then I went home.

Q. Okay. Um, how'd you manage to get out at 2:00 in the morning or so?
A. Well, um, Nathan's dad had let us all come over. There was a whole bunch of us over at Nathan's house that night. And we were just like hanging out and just, you know, we went over. They live in Tamashan, so we went down to the beach. And it was like two o'clock in the morning. And we, Mindy's car was on the street. So we just went out there and left. And that was a stupid mistake. But, we just left and we didn't know. And by the time we came back, it was like eight o'clock. So…

Q. Okay.
A. …in the morning. So he didn't know that we'd even left.

Q. Okay. Um,…did you want to have sex with Jerry Wiatt that night?
A. No, I did not.

Q. Okay.
A. No.

Q. All right.
A. Not at all.

Q. Can you tell me, if you did have sex with him (unintelligible)...
A. I believe yes, I did.

Q. Why do you believe that?
A. Because, um, I could tell. I mean, I remember him putting the condom on. I remember him being naked. I woke up next to him naked. I...I'm just, the way I felt the next day. I felt like I had had sex because it, I wasn't sexually active at the time. Um,...I just...I don't know.

Q. All right. So...I know you told me that you remembered him putting a condom on. Okay. Um, were your clothes on then?
A. I don't remember.

Q. Okay. All right. And...when you wake up in the morning, all right, what ex-, what's the first thing you remember?
A. I remember, I woke up to hear Sarah. She was saying, "Erin, Erin, we need to get the hell out of here. Erin, come on." I woke up and I looked and I was like in the bed and I was naked. And then he was next to me naked. Just sleeping. And he didn't even wake up when I left. He didn't hear me. He didn't say anything. He just slept there. And I just got up and left.

Q. Okay. Did you tell any friends about what happened?
A. Um, Zoe and...um, I never really told Sarah. But, I'm pretty sure she knows. I think Mindy knows.

Q. How do they know?
A. Because, um, Mindy, I think they know because they were there and I told, I talked to Mindy about it. Because we were really good friends, um,...we were...

Q. What did you tell Mindy?
A. Um, I told her that I had thought that Jerry had...raped me.

Q. Okay. All right. Now before you went to the Wiatt residence, had you been drinking?
A. Hm mm.

Q. Okay. And at the Wiatt residence, you had one drink?
A. Yeah.

Q. Okay. And who made that drink?
A. Jerry.

Q. Okay. And...then somehow you got up to his room?
A. Yeah. I do not remember how I got up to his room.

Q. Okay. Now was Sarah having a relationship then with Kevin?
A. No. That was Mindy.

Q. Oh.
A. Mindy, yeah.

Q. Mindy was?
A. They were seeing each other.

Q. Okay. So they were kind of boyfriend, girlfriend?
A. Yeah.

Q. Okay. And Sarah was with this other guy, but you don't know who he is?
A. Yeah. They were just like playing pool. Nothing happened with them. They were just down there.

Q. Okay. And Sarah, and so you and Sarah and Mindy all stayed the night there?
A. Yeah.

Q. Okay. And then in the morning, Sarah's knocking on the door?
A. And she got, woke me up and then we both went and knocked on Kevin's door and got Mindy and then we left.

Q. How do you feel about what happened that night?
A. I feel awful. I feel dirty. I feel like I'm a bad person. I feel like I hate Jerry. I feel awful.

Q. Okay. Why didn't you report?
A. I was afraid.

Q. And what were you afraid of?
A. Like people thinking I was bad, I was afraid of like if he found out, I didn't know what he'd do. Um,...I don't know.

Q. Did you talk to him or go over to his house after that happened?
A. No.

Q. Okay. Did you ever talk to him again?
A. No.

Q. Did you ever talk to his brother, Jeff?
A. Yeah. Yes.

Q. Did you tell Jeff what had happened?
A. Yes.

Q. And what did Jeff say?
A. He said he was sorry. He said he felt bad. Basically, that's all. Said he didn't condone what his brother did. But, (unintelligible) sorry.

Q. Do you know Jeff pretty well?
A. Yeah.

Q. Okay.
A. I feel, I think I do. Maybe I don't.

Q. Has anybody else ever told you that they were a victim of Jerry Wiatt's?
A. Zoe Hawkins. And that's all that I know, honestly.

Q. What did Zoe tell you?
A. Zoe told me that, um, she was raped by Jerry also. And she, um, I was there the night that it happened to her, too. And that, um,...

Q. I want you to think back to that night.
A. Okay.

Q. And…I know we've talked a little bit about that before I took a statement from you earlier about that. Um,…since we've talked, have you remembered anything different or anything about the same?
A. Um, I, it all seems the same to me.

Q. Okay.
A. Whatever.

Q. So, let me see if I've got this right. All right? I get confused. I've talked to a lot of people. It's my understanding that you and Zoe went there, Jeff picked you up…
A. Yeah.

Q. …after a school function.
A. Yeah.

Q. And, um, Jeff, uh, you guys were drinking some beer.
A. Uh huh.

Q. And, then you went with Jeff to the hot tub.
A. Mm hmm.

Q. And, um, Zoe kind of disappears.
A. Yeah.

Q. And she ends up upstairs in Jerry's room?
A. Yes.

Q. And you knock on the door.
A. And I don't hear an answer.

Q. Okay.
A. And it's locked.

Q. Does, does Jerry say anything?
A. Nope. No. Not that I can remember.

Q. All right. And, um, …I forget what happens after that.
A. I tried to open the door. And it was locked.

Q. Oh, okay.
A. So, then I went back outside and got in the hot tub. And then Zoe came running out maybe like fifteen minutes later.

Q. And she wanted to leave or something.
A. And she wanted to leave, yeah.

Q. Okay. And then she ends up being taken home by Kevin.
A. Yes.

Q. Okay. Um, now…Zoe tells you this, or this happens with Zoe sometime in February.
A. Yes.

Q. Why did you go back in May?
A. I didn't think he'd, I didn't know that that would happen. I didn't know he'd be there. I didn't know, at first I didn't know what Zoe had told me was…all the truth. Because sometimes things she says are blown out

of proportion. And I believed her. And I, but it was never, she never really talked about it again. So I didn't know, and I didn't expect to go over there to see, you know, I was going over there that night to see Jeff. And I didn't expect to be like,...you know, I didn't expect to even talk to Jerry.

Q. Okay.
A. You know, I didn't even really know him.

Q. Has, um, Jeff talked to you about any other girls this has happened to?
A. Mm, just the one that reported it the first time. The girl in the paper that first time.

Q. And when did you talk to Jeff about that?
A. Mm, maybe in the last week or so.

Q. Okay. And did he call you or did you call him?
A. Oh, it was on the Internet.

Q. What was on the Internet?
A. (unintelligible) conversation was on computer.

Q. Oh, okay.
A. On America Online.

Q. Okay. And...um, what'd he say?
A. He just said that she was lying and that I wasn't true. And that, um, Jerry had done things in the past that were bad. But, this girl was lying.

Q. Okay.
A. So...

Q. All right. And have you talked to Jerry at all about this?
A. No.

Q. Okay. Has anybody told you not to come forward or not to speak to the police?
A. No.

Q. All right. Um, did Jeff ask you not to do that?
A. No.

Q. Okay. Was Jeff concerned that you might go to the police?
A. He didn't say anything.

Q. Okay. All right. Do you know anything else about this investigation that I need to know about today that we haven't talked about?
A. Um, no, I don't believe so.

Q. Okay. Is everything you've told me today true and correct to the best of your knowledge?
A. Yes.

Q. At any time since we've been talking, um, have you asked me to turn off the tape recorder?
A. No.

Q. Okay. Have I made you any promises or any threats or forced you to come speak with me today?
A. No.

Q. Okay. I'm gonna go ahead and conclude this statement.

ENDING TIME:1650 hours

APPENDIX
F

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 01-1-01136-1
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	DECLARATION OF JAMES C. POWERS RE TRANSCRIPT OF INTERVIEW WITH JENNIFER BOWLES

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

James C. Powers declares and affirms:

I am a Deputy Prosecuting Attorney for Thurston County, Washington, representing the Plaintiff, State of Washington, in the above-entitled cause. Attached is a complete transcript of a taped interview conducted by Thurston County Sheriff's Detective Louise Adams with witness Jennifer Bowles on July 26, 2001. This transcript was part of the discovery provided prior to the trial of the above-entitled cause.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge

DATED and signed this 8th day of May, 2007, in Olympia, Washington

James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney

EDWARD G. HOLM
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
(360) 786-5540 Fax (360) 754-3358

Thurston County Sheriff's Office

☐ Suspect
☒ Victim
☐ Witness

Case #: 01-24273-07
Date: 7-26-01
Time: 1546 hours

NAME: BOWLES, JENNIFER M.

DATE OF BIRTH: 7-27-84

ADDRESS: 4520 14th Ave. NW
Olympia, WA 98502
Phone: 866-8382; 866-0840

INTERVIEWING OFFICER: Det. Adams, TCSO

INTERVIEW LOCATION: TCSO

ALSO PRESENT:

Q. Jennifer, when we talk today I'm going to re-...record our conversation. Is that with your consent?
A. Yes.

Q. Why are you in my office today?
A. 'Cúz Jerry Wiatt raped me.

Q. Okay. And can you tell me how old you were when that happened?
A. I was just 16.

Q. Okay. And how long ago was that?
A. Uh about a year.

Q. About a year ago?
A. Yea.

Q. And you're 17 now?
A. I'll be 17 tomorrow.

Q. So you had just turned 16 when this happened?
A. Yea, it was in August.

Q. And you're born in July.
A. In July.

Q. So you turned 16 in July, he raped you in August. Okay. Do you know if it was the beginning or the end of August?
A. I believe it was in the beginning of August.

Q. And where did that happen at?
A. His house in Sadronna.

Q. Okay. Is that…do you know if that house is located at 3443 32nd Way NW?
A. I do not know the exact address, but I know that it is in Sadronna and…

Q. Sadronna's a housing development?
A. Yes, it's a housing development.

Q. What's the house look like?
A. House is blue. Um…

Q. One level…two?
A. Has two levels.

Q. Uh-huh.
A. There's five bedrooms, I believe. And there's a bathroom in his room and there's an…also another bathroom in the top floor.

Q. Okay. I want you to think back to that August and tell me everything that you remember happened.
A. Well, me and a friend went over there and um…

Q. Who was the friend?
A. Amanda Chinn.

Q. Okay. And you went over to Jerry Wiatt's?
A. Yes.

Q. Okay.
A. And we were just sitting there and he made us some drinks.

Q. Who's he?
A. Jerry.

Q. Okay.
A. Jerry made us drinks.

Q. What kind of drinks?
A. Um is Malibu and um I don't know what else was in it, but I remember we had some drinks of Malibu and Kahlua and B-52 shots and Tequila, there's a lot of alcohol involved.

Q. Okay.
A. And we got really drunk and then we just started playing, I guess. We were running around the house and stuff and then he asked me if I wanted to go look at his candles and I said sure. And they just happened to be in his bedroom and so I went up there and we looked at his candles for a while and he started fooling around with me and I didn't think anything of it at first and 'cuz I was drunk and…I know that's not an excuse, but at the same time…and then we were sitting on the bed and he proceeded um and I said no. And he kept on proceeding and I kept on saying no. And, and you just get to the point where you don't say anything anymore and it just happened and that's about all I remember.

Q. Okay. When you say he kept proceeding, what was he doing?
A. He was taking off my clothes. And moving his hands all over everything.

Q. Okay. Did he remove your clothing? Is that what you're trying to tell me?
A. Yes.

Q. Okay. And did you do anything to prevent that?

A. I said no, that's all.

Q. Okay. And did he stop when you said no?
A. No.

Q. Okay. And did he manage to remove all your clothing?
A. Yes.

Q. When that was happening to you, uh Jennifer, were his clothes on?
A. Pants at the time.

Q. Okay. And when did his clothes come off?
A. Very shortly after.

Q. Okay. Were you able to get away or anything like that?
A. Yes. I (unintelligible) away but then he just told me that I should, that I wanted it.

Q. Okay. But you clearly told him no?
A. Yes.

Q. Okay. And then what did he do?
A. He proceeded and he had sex with me.

Q. Okay. Now I know what that means, okay. But can you tell me exactly what he did to have...when he had sex with you?
A. You mean?

Q. Well, your definition of sex. Did he...I want to know if he put his penis in your vagina...
A. Yes.

Q. ...and if that's what you're talking about.
A. Intercourse.

Q. Okay, alright. I've had people come and in and said they had sex and I said, well what does that mean? And they said well it's when a guy kisses a girl. Okay, so...
A. Uh, no.

Q. ...we need to be pretty clear here when you say what sex is, what that is.
A. I'm sorry.

Q. That's alright. He had sexual intercourse with you.
A. Yes (mumbles - unintelligible).

Q. Okay. And how did it end?
A. (unintelligible) how did it end?

Q. Well, um did he ejaculate? Do you know?
A. Yes.

Q. Okay. Do you know if he wore a condom when that happened?
A. I do not know.

Q. Okay. Um was anybody else in the room at the time that happened?
A. No.

Q. Where was your friend Amanda?
A. Downstairs with his friends.

Q. Okay, alright. Now you told me there was a lot of alcohol involved.
A. Yes.

Q. Alright. Um how many drinks or shots to you think you had before you ended up in his room?
A. I know that I at least had three different drinks. And the B-52 shots I can't...I don't know, four or five maybe.

Q. Okay.
A. I guess.

Q. Alright. When the sex act was done, what happened then?
A. He just went...he, he left.

Q. What did you do?
A. He went back downstairs and so did I.

Q. Okay. Did you tell anybody about what happened?
A. I told Amanda um couple days later.

Q. Okay. Did she...
A. 'Cuz she asked me why I was gone for so long.

Q. Okay. And what did you tell Amanda?
A. That he had sex with me...um sexual intercourse with me.

Q. Okay. Did you tell her that was something you didn't want?
A. Yea.

Q. Okay. You never reported this to the police. How come?
A. I don't know.

Q. When you got to the residence, do you know about what time that was?
A. Maybe 10. It was dark and it was summer.

Q. Okay.
A. So 10...10-ish.

Q. Okay. Who was at the residence when you got there?
A. Um they're his older friends. Um I don't know what their names are. I think one was Joe or something.

Q. Okay.
A. And I don't really know, but they uh they left. Went over that night...they went to Thekla.

Q. Okay. After the intercourse was done, you went back downstairs, did you stay at the residence, or did you leave?
A. I stayed because well I was young and I told my parents that I spent the night at my friends house and she...we spent the night there.

Q. Okay. Did you ever ask anybody to take you home or anything else?
A. No.

Q. Okay. And so you spent the night there?

A. (inaudible).

Q. You gotta talk out loud for the tape recorder.
A. Oh, yes.

Q. Okay. Did you ever go back to Jerry Wiatt's residence?
A. After that, no.

Q. Okay. Why?
A. I just didn't feel right.

Q. Um do you know of any young...other young girls um that maybe this might have happened to?
A. Uh I know a girl named Sherry Waltermuyer and this would have happened to her in '99. I knew her at 14, I believe.

Q. Okay. What do you know about Sherry and how do you it?
A. Um my friend, Haley Legaults was at the house um at the time this happened. She h-...um Sherry was very drunk and Jerry took her into the room, then he locked the door and Haley says that she passed out or something, she's not sure. And they were banging on the door and no one would let them in and no one would let her out. And when Sherry finally did come out, she wouldn't stop crying the whole entire time and they asked her what was the matter and they asked people to take 'em home, but no one would take 'em home and so they had to stay there.

Q. Okay and who's them?
A. Um I don't know who was with them. I think Jeff was there.

Q. Jeff Wiatt?
A. Yea.

Q. But it would have been Sherry Waltermuyer?
A. Haley Legault.

Q. Haley Legault.
A. Laura Kourmandy, Jamie McDonald.

Q. Alright. So we have Haley Legault, who else was there?
A. Laura Kourmandy, Jamie McDonald.

Q. Okay.
A. And I think a guy named Justin Kalibresie was there.

Q. Justin Kalibresie?
A. Yea.

Q. You know of any other girls that may a victim of Mr. Wiatt?
A. No.

Q. Okay. Do you, or have you seen or have you heard about any video taping that has occurred at the residence?
A. Yes I've heard about video taping, but not at the particular residence.

Q. What did you hear about video taping?
A. I heard there was a particular video tape up at Whistler of them all running around naked and chasing girls and things like that.

Q. Okay. Alright. Um is there anything else about um the incident involving you and Jerry that we haven't talked about that I need to know about?

A. Not that I can think.

Q. Okay. Um I know you told me that he had vaginal intercourse with you. Can you tell me what your body position was during that?

A. I was laying down.

Q. Okay. Were you on your side, your back, your stomach?

A. My back.

Q. You were laying on your back? Okay. Was there any other type of sexual contact other than straight missionary style, for lack of a better word, vaginal intercourse?

A. Um no that was the only.

Q. Okay. Alright. Is there any thing else, Jennifer, you'd like to add to this statement at all?

A. No.

Q. Okay. What made you decide to come forward now?

A. I had some friends who were concerned about me and felt it would be a good idea.

Q. Okay. And why would they be concerned about you at this late date?

A. I don't, I guess they said 'cuz they saw in the paper that, and then they've heard from a bunch of other girls of things that have happened and then they just felt that it was time for him to have to live up to it and...

Q. Okay.

A. ...(mumbles - unintelligible).

Q. Okay. I'm going to go ahead and conclude this statement.

ENDING TIME: 1558 hours

APPENDIX G

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 01-1-01136-1
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	DECLARATION OF LOUISE ADAMS

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

Louise Adams declares and affirms:

I am currently a Detective with the Thurston County Sheriff's Office. I have been a law enforcement officer for approximately twenty years. I was assigned to the Detective Division of the Thurston County Sheriff's Office in 1995 and have worked in that Division since that time. During the period of 2001-2003, I was the lead investigator for the Sheriff's Office with regard to allegations which eventually resulted in charges against Jerry D. Wiatt, Jr. in Thurston County Superior Court Cause No. 01-1-01136-1.

Neither during the investigation of allegations against Mr. Wiatt nor thereafter have I ever asserted to anyone that evidence of date rape drugs was found at Mr. Wiatt's house during the search that the Sheriff's Office conducted at that residence pursuant to a search warrant, nor have I ever claimed to

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Olympia, WA 98502
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anyone that Mr. Wiatt was connected to the Asian Mafia. In addition, I have never stated that law enforcement had Mr. Wiatt's house under surveillance or that there were multiple incidents where girls ran out of Mr. Wiatt's residence half-naked after being raped. However, one woman did report that she had left Mr. Wiatt's residence on foot in the early morning and had gone to a neighbor of Mr. Wiatt for assistance after she had been raped by Mr. Wiatt.

I never told anyone that law enforcement had obtained a videotape of girls lying on beds in a row while Mr. Wiatt had sex with them one after the other.

During my investigation of the allegations against Mr. Wiatt, I did interview Joel Hawkins. I never spoke to him about whether he should testify or about what he should say or not say if he did testify. My purpose was solely to learn whether Joel Hawkins had any information pertinent to my investigation, since he had been a friend of Mr. Wiatt and had resided with Mr. Wiatt for a short time. With Mr. Hawkins' permission, I conducted a tape-recorded interview with him. A complete and accurate transcript of that tape-recorded interview is attached to this declaration.

As the transcript shows, Mr. Hawkins stated that he had resided with Mr. Wiatt for only one month because underage females were frequenting the residence and alcohol was being served to them, and Hawkins was concerned about his employment. Hawkins further stated that he had talked to Mr. Wiatt about this and had said to Mr. Wiatt that "we can't be having this because of my occupation, which is a high school teacher". However, according to Mr. Hawkins, the behavior continued despite Hawkins' concern and so he moved out.

As can be seen, it was Mr. Hawkins who, during the course of this interview, raised the subject of concern about his employment due to his having lived in the defendant's residence. According

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to Mr. Hawkins, it was a concern he had when he resided with Mr. Wiatt, and so he may well have continued to feel that concern when I questioned him. However, any such concern was not the result of a suggestion or comment that I made to him.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge

DATED and signed this 17th day of May, 2007, in Olympia, Washington.

Detective Louise Adams
Thurston County Sheriff's Office

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Thurston County Prosecuting Attorney
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Olympia, WA 98502
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Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 9 Oct 2001
Time: 1415 hours

NAME: HAWKINS, JOEL B.

DATE OF BIRTH: 09-16-74

ADDRESS: 6929 Shady Lane SE, Lacey, WA 98503
Message: 360 791-5775

INTERVIEWING OFFICER: Det. Louise Adams, TCSO

INTERVIEW LOCATION: Hawkins residence

ALSO PRESENT:

Q. Joel, when we speak today, I'm going to use a tape recorder to record our conversation. Is that with your consent?
A. Yep.

Q. Um, I know last week we had an interview arranged and I had to cancel it, I apologize. Um, but prior to, um, having contact with you today, um, I did, I think, speak with you at least once or two times on the phone, is that accurate...
A. Yes.

Q. ...to your recollection? And, um, I told you I wanted to speak to you reference the Jerry Wiatt case, is that...
A. Correct.

Q. ...accurate? Okay. Um, I understand, uh, that Jerry Wiatt is someone you know?
A. Correct.

Q. How do you know him?
A. Uh, we w-, started out being friends going to ski school when we were younger, and ended up being college roommates, and continued to spend friendship time together...

Q. Okay.
A. ...after college.

Q. So how long have you known him you figure?
A. Uh, I met him in 7th grade, ski school.

Q. Okay, so quite a while.
A. Yeah.

Q. And did you ever reside with Jerry?
A. Yeah.

Q. When and where?
A. Uh, college, up in Bellingham around '97...

Q. Um hm.
A. ...1997 for about five months, and then I lived with him for a month from the end of December of 2000, well, say at the beginning of January 2000 to the end of January 2000. 01, 2001. Was it this year, this past January.

Q. So you lived with him for a total of one month.
A. One month.

Q. So would it be January 1st 2001 to the end of...
A. Yeah.

Q. ...January-
A. 2001.

Q. 2001, okay. And where, uh, did you live with him at?
A. Uh, his house out in, uh, 3443 whatever his ad-

Q. Cedrona?
A. Cedrona.

Q. In the Cedrona Development?
A. Yeah.

Q. Okay. Um, how did that, who all was residing at that residence when you were there?
A. Um, myself, Jerry, Justin-don't know what his last name is, and Barry-don't know his last name.

Q. Barry Speck?
A. I don't-

Q. Justin (sounds like) Calbrieze, Justin Allison?
A. Justin Allison.

Q. Okay. Um, and how did, how come only a month?
A. Uh, because there was underage females, uh, frequenting the house.

Q. Tell me about that.
A. Uh, (indistinguishable)

Q. Tell me about Jerry's house, what went on there.
A. Uh, there'd be underage people that came in. Um, all the roommates besides myself would bring 'em over.

Q. Okay.
A. Um, Jerry's brother was close to their age.

Q. Is this Jeff?
A. Jeffery.

Q. Okay.
A. And so they'd be over there, and I talked to Jerry about it, and I said, we can't be having this because of my occupation, which is a high school teacher.

Q. Um hm.
A. And each time that they were over there, I'd either go up to my room an-, or I would leave the house. 'Cause I can't have that. And I talked to him about it, and it still went on. So I ended up moving out.

Q. Okay. What, um, what was the problem with having underage females there? I know that, uh, because of your employment that made you feel uncomfortable. But was stuff going on with those underage females that made you uncomfortable?
A. Oh, there was alcohol.

Q. Okay. And who was providing that alcohol?
A. I couldn't tell you that.

Q. Okay.
A. It was already out when I would get home.

Q. So it'd be like out on a counter or-
A. Or in their hands.

Q. Okay, and would this be like an open bar kind of thing? Never been invited there to a party, explain to me how it worked.
A. No, there, there was never a party.

Q. Okay.
A. Except for the last time. I believe it was in July.

Q. Um hm.
A. Uh, there was a situation where I was at Thekla with a couple friends, and Jerry was there, and he invited us over to his house to go hot-tubbing or play pool or what-not. And it ended up being that his brother was having some people over.

Q. Um hm.
A. And there was underage girls there.

Q. Okay. How do you know they were underage?
A. Because they were with his brother, I, actually I didn't really know they were underage but turned out that they were. Um, just alcohol was involved and everything. I was there for about 15 minutes and then left.

Q. Okay. Um, did you know any of the p-, other people that were there? Any of the kids?
A. Just the people that I came with.

Q. Okay, and who was that?
A. A girl named Christy Bush, and a guy named Kevin Clark, and a guy named Orlando Johnson, I believe is his name, last name.

Q. Okay. Um, was there a problem at the residence that night that you were there?
A. Not that, not when I was there. I heard about, uh, the whole incident afterwards.

Q. What'd you hear?
A. Uh, that, well, just what the paper said, that his cousin was in videotaping and-

Q. Okay, and you think that was the night that you were there?
A. Yeah.

Q. How do you know that?
A. Well, he told me.

Q. Who told you?
A. He said that, he asked me if I knew who the girl was that was involved. Jerry.

Q. You've lost me. I'm sorry. I'm confused.
A. The night that I was there in July...

Q. Uh huh.
A. ...uh, Jerry asked me if I knew who the girl was, 'cause there were a bunch of girls there...

Q. Okay.
A. ...that turned him in for date rape or whatever it was.

Q. Oh, okay. And so after you'd left and on a different day, then he had the conversation with you and he asked you if you knew the girls?
A. Yeah.

Q. Okay. And you did not?
A. I didn't.

Q. Okay.
A. He even showed me a picture of her, and I didn't remember.

Q. Where'd he get a picture?
A. I believe over the Internet or his lawyers or, I don't know, friends.

Q. Okay. How, how long ago did he show you a picture?
A. Couple months ago.

Q. Couple months ago. Okay. So, so how long after the incident did you see a picture of the girl?
A. August, September.

Q. Okay.
A. Recent, I mean, mo-, month or two ago.

Q. (Indistinguishable) recent. Okay. Um, so you, correct me if I'm wrong here, you believe that the night, um, when you came home with Jerry at Thekla's and there was a party there and some of Jeff's friends were there, um, that that, one of the girls there, that was there that night reported that he had raped 'em, and that's when this videotaping and stuff that was in the paper allegedly occurred?
A. Correct.

Q. Okay. And, um, Jerry s-, sev-, um, several months later showed you a picture-
A. Well, well, the incident wasn't several, the incident was about three months ago...

Q. Right.
A. ...July so-

Q. Right. But you didn't see the picture...
A. Like a month after it happened was-

Q. ...right away, okay, right. And then asked you if you knew that girl but you didn't?
A. Yeah.

Q. Okay. Um, did, do you remember seeing that girl there that night?
A. No, I've never seen her.

Q. Okay. Do you remember the picture, what she looked like, that Jerry showed you?
A. Do I remember what she looks like?

Q. Yeah, from the picture.
A. Not, I don't think so. I'm picturing a dark-haired girl.

Q. Okay. Alright. Um, but, and so you don't, you came over from Thekla's with him that night but you don't remember that female being there?
A. Hu-uh.

Q. Okay, but you think that's the night this whole thing kinda started?
A. Um hm.

Q. Okay. Um, anything else going on at that residence that caused you to be concerned? Anything before you live there, or anything that you've heard after?
A. No.

Q. And, but there were underage, what you, you felt were underage females there, there was drinking going on, that made you uncomfortable?
A. Um hm.

Q. Okay.
A. Well, one night I came home and I think I was at a wrestling tournament 'cause I coach, I coach for high school, and there was a girl in a Black Hills cheerleading outfit.

Q. Okay.
A. And that really kinda disturbed me.

Q. Okay. Um, what's the general age of the girls that were usually at that residence?
A. I don't know. High school.

Q. Okay. Did you consider that pretty much a party house, and a place where high school girls hung out while you were there?
A. I wouldn't call it a party house. But, I mean, there were girls that frequented it.

Q. Okay. Uh, while you were there, uh, were there ever, um, any girls that complained about, uh, behavior going on there or girls, uh, that you felt were like overly intoxicated and at risk?
A. No.

Q. Okay. Anybody ever, um, have a problem with anything that occurred in Jerry's bedroom as far as you know?
A. No.

Q. Anybody pounding on doors or trying to get girls out or anything like that?
A. No.

Q. Okay. Did you ever have any concerns about anything like that happening at the residence?
A. No.

Q. How about with any of the other roommates other than Jerry?
A. No. I didn't, I didn't know the other roommates too well. But, I mean...

Q. Okay.
A. ...I never heard of anything like that.

Q. Okay. Um, did, while you were living there, do you know anything about any video taping or anything like that that occurred at the residence?
A. I didn't until I read it in the paper.

Q. Okay. Um, does that surprise you?
A. Yeah, it actually does.

Q. Okay. Um, how about any date rape drugs, any concerns about that?
A. No, not, that would ver-, it would really shock me.

Q. Okay.
A. Jerry w-, is not like that.

Q. Okay. Alright. Um, did you ever feel that any of the females that had gone to Jerry's house, um, were taken advantage of?
A. No.

Q. Okay. And have, when did you first talk to Jerry about this case?
A. Probably when he got out of jail, when he posted his bail. I just, I said, what's the deal, you know.

Q. And?
A. And he told me about the incident that was reported.

Q. Okay. Alright.
A. And then it steadily bui-, built up, you know, with case after, or, you know, like 21 counts or something, whatever it is now. I don't really know.

Q. Okay. Did, um, anybody, any of these girls ever ask you to give you them a ride home or...
A. No.

Q. ...to take them home or anything like that?
A. No.

Q. Okay. So were there any, other than the younger girls and the drinking going on at the residence, anything about Jerry's behavior or things that were going on at that residence that caused you any concern?
A. Nope.

Q. Okay. And you had a discussion with Jerry about the girls? About their ages, things like that?
A. When I was living there?

Q. Um hm.
A. Yeah.

Q. And what did he say?
A. I couldn't remember.

Q. Okay. But you basically said it can't be going on?
A. Correct.

Q. And did it continue to go on?
A. Well, he had a, he made it a point to the roommates not, 'cause they were brin-, that's why they were over there pretty much, Jerry wasn't bringing 'em over there.

Q. Okay.
A. The roommates were like 20 years old, I believe.

Q. Um hm.
A. And they were bringing 'em over. And he did make a point to the house that we can't be, you know, having so many girls over there, underage, but-

Q. Okay.
A. You know, he'd go out of town 'cause he has a business in China and, uh, he goes to like trade shows and stuff.

Q. Um hm.
A. And when they, when he'd leave, they'd bring 'em over too so-

Q. Okay. Did Jerry ever tell you or talk to you about having any problems with any of the girls that were at the residence?

A. No.

Q. How about a girl that had come to the residence and had left, um, and had stopped at an ex-policeman's house or someone like that in the area, you ever hear anything about that...

A. No.

Q. ...young lady?

A. No.

Q. Okay. The night that you came home from, um, Thekla's, you had been with Jerry, um, was his cousin, Johan, there?

A. I-

Q. Did you ever meet Johan?

A. Yeah, I met him cousin, I don't know what his name was.

Q. Okay, and, and where did you meet his cousin at?

A. At, I think it was at Thekla's.

Q. Okay. This might not be a great picture but, um, does that look like his cousin to you?

A. I, I don't know.

Q. You don't know, okay. Um, and you wouldn't know what his cousin's last name was?

A. No.

Q. Okay.

A. Well, I thought his cousin went to school in New York but then the paper said he was from, what, Denver or something.

Q. Okay. You knew a young lady, um, that Jerry dated by the name of Megan Blevins?

A. I don't know names.

Q. Okay. You know any of the girls' names that he dated?

A. (Inaudible)

Q. Okay. Um, did Jerry, um, I me-, did you talk to Jerry about this upcoming interview?

A. I did.

Q. Okay. And what did Jerry have to say about that?

A. He thought that he'd want his lawyer present.

Q. Okay. Alright. Did Jerry in any way try to, um, persuade, um, you in swaying your testimony one way or the other?

A. No.

Q. Okay. Um, what do you think about this whole thing? I know you've read some things in the paper, and, um-

A. I think it's blown way out of proportion.

Q. Okay. And, and why do you say that?
A. Probably just because I've known Jerry for so many years, and I don't believe that he could do something like that.

Q. Okay.
A. But you know I, what goes, what goes on in people's houses when I'm not around, I don't know, you know.

Q. Okay. Have, um, you ever seen any video tapes, um, of Jerry having sex with any girls?
A. Never.

Q. Okay. How about any pictures of girls without their shirts on or things like that that was, um, like stills that were on his computer or anything like that?
A. No.

Q. Okay. Um, you believe anything like that exists?
A. Video tapes and stuff?

Q. Um hm.
A. Well, they confiscated like three of 'em, I heard, so-

Q. Okay. But you never saw anything like that when you were living there?
A. No.

Q. Okay. Um, anything you can tell me about the other roommates?
A. No.

Q. Okay. Is there anything else that you know about this investigation, um, that we have not talked about, that I have not asked you? Anything else that, um, may come up that you need to share with me?
A. Not that I can think of.

Q. Okay. Um, some of the girls that I talked to, um, told me that they had been instructed, uh, to tell you that they were 18 years old. What do you think about that?
A. I had no idea until you told me that...

Q. Okay.
A. ...they told you that.

Q. Would that surprise you?
A. That they were instructed to tell me that they were 18?

Q. Yeah. Or that that was a concern for these girls.
A. I don't think Jerry would say that, or tell them to say that they're 18 but the other two, I don't know the other two roommates as well.

Q. Okay.
A. So they might have.

Q. Alright.
A. Actually I do have something that I'd like to say.

Q. Hm?
A. I think that if Jerry gets in trouble for this...

Q. Um hm.
A. ...that there needs to be an investigation on like Justin and Barry and what's, Kevin...

Q. Barlow?
A. ...Kevin Barlow.

Q. Justin Allison?
A. Yeah, because I think they, they're just as guilty for having minors over.

Q. Okay. Alright. Just as guilty in furnishing alcohol to minors?
A. I don't know who furnished it.

Q. Okay.
A. Because it was already out so I don-, I'm not-

Q. So what would they be guilty of? I mean, they're all younger than Jerry.
A. I just think that you need to ask the girls questions about them maybe also.

Q. Okay, alright. Did you ever get the impression that any of those guys were maybe committing crimes or doing things that were inappropriate with young ladies?
A. I know that they would be in their bedrooms.

Q. Okay.
A. But I don't, I mean, we obviously can think what they're doing but-

Q. Okay. Were there ever any young ladies in Jerry's bedroom that were clearly underage that caused you any concern while you were there that you saw?
A. That caused me concern?

Q. Um hm.
A. No.

Q. Okay. Okay. So all those girls, um, if there were girls in his bedroom, they were clearly, um, over the age of 16, which is the age of consent?
A. I hope so.

Q. And that, um, you don't, did you ever see any girls that were so intoxicated at that house that you felt that they could not, or should not be making a decision on whether they were having consensual sex?
A. Never.

Q. Okay. Alright. Anything else, Joel, you'd like to add to this statement?
A. Well, I'd like to pump Jerry up 'cause he's one of my best friends but, I mean, I don't know how much it's going to help. I just think he's a good person, and I hope that he doesn't get in trouble.

Q. Okay. Everything you told me true and correct?
A. Correct.

Q. Okay. Um, at any time during this statement, have you asked me to turn off the tape recorder or have I turned it off?
A. No.

Q. I'm going to go ahead and conclude this statement. It's approximately 1432 hours.

ENDING TIME: 1432 hours

APPENDIX H

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	NO. 01-1-01136-1
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	DECLARATION OF KIM CARROLL

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

Kim Carroll declares and affirms:

I am currently a Victim Advocate with the Thurston County Office of Prosecuting Attorney. I have held that position for approximately nine years. During the period of 2001 to 2003, I had the responsibility of coordinating between the Office of Prosecuting Attorney and persons who were alleged victims in regard to charges filed against Jerry D. Wiatt, Jr. in Thurston County Superior Court Cause No. 01-1-01136-1.

During my contacts with the alleged victims in this case, both before and during the jury trial, I never suggested that any of them should cry while testifying, nor did I ever encourage any of them to do so. The only advice that I ever gave any of these persons with regard to testifying was to tell the truth.

I cannot say whether I ever had my hand in the vicinity of my face prior to one or more of the alleged victims going into court to testify. However, I can state with certainty that I never gestured for the purpose

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of signaling to any witness that the witness should cry on the stand.

I never heard anyone advise one of the alleged victims in this case to cry while testifying. However, they generally had persons with them for support when they testified and, of course, I do not know what was stated to alleged victims by others when I was not present.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge

DATED and signed this 9 day of May, 2007, in Olympia, Washington.

Kim Carroll

EDWARD G. HOLM
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APPENDIX
I

*2005 Wash. App. LEXIS 849, **

STATE OF WASHINGTON, Respondent, v. JERRY D. WIATT, JR., Appellant.

No. 30168-7-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2005 Wash. App. LEXIS 849

April 26, 2005, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at State v. Wiatt, 127 Wn. App. 1008, 2005 Wash. App. LEXIS 1674 (Wash. Ct. App., Apr. 26, 2005)

PRIOR HISTORY: Appeal from Superior Court of Thurston County. Docket No: 01-1-01136-1. Date filed: 03/31/2003. Judge signing: Hon. Gary R Tabor.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a decision of the Superior Court of Thurston County (Washington), which convicted him of 18 charges that included second degree rape under Wash. Rev. Code § 9A.44.050(1)(b), third degree rape under Wash. Rev. Code § 9A.44.060(1)(a), sexual exploitation of a minor, voyeurism, and furnishing liquor to a minor. Defendant also appealed his exceptional sentence.

OVERVIEW: Two of the second degree rape charges stemmed from charges that defendant provided alcohol to a minor, victim number one, had intercourse with her, and videotaped it. There was testimony and charges of similar incidents involving different victims. The court held that (1) the information was insufficient to demonstrate that the informants had a basis of knowledge that a videotape existed in that defendant told the informants about it, and the affidavit used to obtain the search warrant for defendant's residence contained no facts showing how a detached magistrate could have concluded that each level of hearsay was reliable; (2) while there was probable cause to search for evidence of rape, the videotapes and camera did not fall under the plain view doctrine because they did not give probable cause to believe that they were evidence of a crime; (3) defendant invited the jury to consider the possibility of date-rape drugs; (4) sufficient evidence existed to support both the convictions of second degree rape and third degree rape; and (5) nothing in the language of the instructions defining second and third degree rape suggested that the jury should assume that a crime was committed.

OUTCOME: The court reversed the convictions as to second degree rape, sexual exploitation of a minor, sexual motivation, and voyeurism involving victim number one. The court affirmed as to all other counts.

CORE TERMS: rape, videotape, sexual intercourse, video, detectives, tape, sexual, informant's, bedroom, video camera, prosecutor, sentence, date-rape, drink, intercourse, evening, probable cause, physically, lubricant, hearsay, incapacitated, raped, sex, jury instruction, mentally, probable cause, convicted, helpless, plain view, search warrant

LexisNexis(R) Headnotes ◆ Hide Headnotes

Criminal Law & Procedure > Sentencing > Departures

HN1 Under former Wash. Rev. Code § 9.94A.390(2)(i) (2000), a court may impose an exceptional sentence if the operation of the multiple offense policy of former Wash. Rev. Code § 9.94A.400, recodified as Wash. Rev. Code § 9.94A.589 (2001), results in a presumptive sentence that is clearly too lenient. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Issuance by Neutral & Detached Magistrates

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General Overview

HN2 An appellate court reviews the validity of a search warrant for abuse of discretion, giving great deference to the issuing magistrate. Abuse of discretion is shown where a court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN3 Generally, a warrant is valid if a reasonable, prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched. As long as the basic requirements are met, the appellate court reviews an affidavit in a commonsense, not hyper-technical manner. Doubts should be resolved in favor of the warrant. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants > Credibility, Reliability & Veracity

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > General Overview

Criminal Law & Procedure > Accusatory Instruments > Warrants

HN4 Washington applies the two-pronged Aguilar-Spinelli test to determine whether information provided by an informant establishes probable cause to issue a search warrant. The affidavit must sufficiently identify the basis for the informant's information and establish the informant's credibility. If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants > General Overview

HN5 To satisfy the "basis of knowledge" prong of the Aguilar-Spinelli test, an informant must declare that he or she personally has seen the facts asserted and is passing on first-hand knowledge. In addition, where an informant's information is based on hearsay, this hearsay-upon-hearsay is acceptable so long as both levels of hearsay satisfy the Aguilar-Spinelli test. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Confidential Informants > Credibility, Reliability & Veracity

HN6 An informant's veracity is established for the purposes of a search warrant affidavit when the informant provides firsthand details and is a named citizen. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Personal Knowledge

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Plain View

HN7 The plain view doctrine allows officers to seize an item without a warrant, if while acting in the scope of an otherwise authorized search, they acquire probable cause to believe that the item is evidence of a crime. The doctrine does not allow an additional, unauthorized search; police must have "immediate knowledge" that they have incriminating evidence before them. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Inevitable Discovery

Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview

HN8 Evidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State proves by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery and that the evidence would have been inevitably discovered under proper and predictable investigatory procedures. The State must show that the legal means of obtaining the evidence would have been "truly independent" of the illegality and that the discovery by those means would have been "truly inevitable." The rule allows neither speculation as to whether the evidence would have been discovered nor speculation as to how it would have been discovered. More Like This Headnote

Criminal Law & Procedure > Double Jeopardy > Appeals
Criminal Law & Procedure > Appeals > Remands & Remittiturs
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

HN9 Where an appellate court reverses a conviction and remands for a new trial, the double jeopardy clause is ordinarily not offended. If the reversal is not for insufficiency of evidence, the defendant may be retried for the convicted offense and any lesser included offenses. More Like This Headnote

Criminal Law & Procedure > Witnesses > Credibility
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor

HN10 Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom. Circumstantial evidence is as reliable as direct evidence. An appellate court defers to the trier of fact regarding a witness's credibility or conflicting testimony. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements
Criminal Law & Procedure > Defenses > Consent

HN11 Wash. Rev. Code § 9A.44.050(1)(b) requires the State to prove that, under circumstances not constituting rape in the first degree, the defendant engaged in sexual intercourse with another person when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. "Mental incapacity" is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by the influence of a substance, illness, defect, or from some other cause. Wash. Rev. Code § 9A.44.010(4). "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. Wash. Rev. Code § 9A.44.010(5). More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Rape > Elements
Criminal Law & Procedure > Defenses > Consent

HN12 Under Wash. Rev. Code § 9A.44.060(1)(a), a person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degree, such person engages in sexual intercourse with another person, and the victim did not consent to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct. § 9A.44.060(1)(a). "Consent" means that, at the time of the sexual contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse. Wash. Rev. Code § 9A.44.010(7). More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview

HN13 Wash. Rev. Code § 9A.44.010(7) requires that, for an individual to consent to sexual intercourse, he or she must use actual words or conduct indicating freely given agreement at the time of the sexual contact. There is no language in the statute indicating that consent, or lack thereof, must be communicated prior to commencement of sexual intercourse. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense

Evidence > Procedural Considerations > Judicial Intervention in Trials > Comments by Judges > General Overview

HN14 The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Wash. Const. art. 4, § 16. But an instruction that states the law correctly and is pertinent to the issues raised in the case is not a comment on the evidence. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Requests to Charge

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Constitutional Errors

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Jury Instructions

HN15 Under the doctrine of invited error, even where constitutional rights are involved, appellate courts are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense

HN16 When a charging document alleges a statutory alternative means of committing a crime, it is error to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. A defendant cannot be tried for an uncharged offense. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Elements of the Offense

Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Jury Instructions

HN17 Where an instructional error favors the prevailing party, courts presume it is prejudicial unless it affirmatively appears that the error was harmless. Error may be harmless if other instructions clearly and specifically define the charged crime. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Defenses > Consent

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense

HN18 An appellate court reviews jury instructions in their entirety and finds them sufficient if they permit each party to argue its theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Criminal Law & Procedure > Trials > Judicial Discretion

HN19 The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 guarantee criminal defendants the right to confront and cross-examine witnesses against them. But the right to cross-examine adverse witnesses is not absolute. A court may, within its sound discretion, deny cross-examination if the evidence sought is vague, argumentative, speculative, or irrelevant. More Like This Headnote

Criminal Law & Procedure > Counsel > Prosecutors

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Legal Ethics > Prosecutorial Conduct

HN20 In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that the prosecutor's conduct prejudiced his right to a fair trial. Prejudice is established only where there is a substantial likelihood the instances of misconduct affected the jury's verdict. More Like This Headnote

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > General Overview

HN21 An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Curative Instructions
Criminal Law & Procedure > Appeals > Reviewability > Waiver > Prosecutorial Misconduct
Legal Ethics > Prosecutorial Conduct

HN22 A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill intentioned that it causes enduring and resulting prejudice that a curative instruction could not have remedied. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > Informations
Criminal Law & Procedure > Jury Instructions > General Overview
Criminal Law & Procedure > Appeals > Reviewability > General Overview

HN23 In general, the crimes charged in an information are the only crimes for which the defendant may be convicted and on which a jury may be instructed. However, the defendant may be convicted of, and the jury instructed on, a crime that is an inferior degree to the one charged. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > General Overview

HN24 Wash. Rev. Code § 9A.44.050(1)(b) does not require any showing of the victim's relation to the defendant or how the victim came to be in proximity to the defendant at the time of the rape. Nor does it require a showing that the victim is mentally ill or handicapped; under Wash. Rev. Code § 9A.44.010(4), mental incapacity may be caused by the influence of a substance, illness, defect, or from some other cause. More Like This Headnote

Criminal Law & Procedure > Witnesses > Credibility
Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN25 An appellate court defers to the trier of fact on issues of witness credibility and conflicting testimony. More Like This Headnote

COUNSEL: For Appellant(s): Lenell Rae Nussbaum, Attorney at Law, Seattle, WA.

For Respondent(s): Steven Curtis Sherman, Thurston County Pros Ofc, Olympia, WA.

JUDGES: Authored by C. C. Bridgewater. Concurring: Elaine Houghton. Dissenting: Christine Quinn-Brintnall.

OPINION BY: C. C. BRIDGEWATER

OPINION

BRIDGEWATER, J. -- Jerry D. Wiatt, Jr. appeals his 18 convictions that include second and third degree rape, sexual exploitation of a minor, voyeurism, and furnishing liquor to a minor. He also appeals his exceptional sentence. We reverse and remand five counts based upon an unlawful search, and we affirm the remainder of the convictions. Because we have reversed and remanded, we do not address the sentencing issue.

FACTS [1]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

1 Because Wiatt has raised sufficiency of the evidence as to the counts involving Ms. Cruz and Ms. Rankis, we have set forth in detail the facts underlying these counts.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*2] In December 1999, Wiatt purchased a house in Olympia, Washington. Wiatt was 26 years old. Wiatt shared his house with roommates to help pay the mortgage. Parties were held regularly at the house, and Wiatt and his roommates frequently provided alcohol to underage guests.

I. A. Cruz

On July 9, 2001, A. Cruz contacted police and reported that she had been raped by Wiatt. She stated that she had not reported the incident earlier because she did not want any "drama" in her life and because she would soon be leaving Olympia to attend college. Clerk's Papers (CP) at 219. But the previous day, her friend, Nicole Smith, informed Ms. Cruz that she was on a videotape being "tag teamed" by two guys. CP at 219. Ms. Smith had learned this information from Nick Deor. Ms. Cruz stated that she was shocked. Later that evening, Ms. Cruz's friend, Huyn Thoong, called her and informed her that she had also heard about the videotape. Thoong told Ms. Cruz that an individual named Barry had viewed a videotape of her having intercourse "dogg[y] [style]." CP at 219. At trial, Ms. Cruz testified that she then confided in her aunt, who took her to the emergency room and encouraged her to notify the police. **[*3]** Ms. Cruz further testified that she had not had consensual intercourse, was unaware that she had been videotaped, and had not granted anyone permission to tape her.

During separate pre-trial police interviews, Ms. Cruz, Thoong, and Annlee Hoy, another of Ms. Cruz's and Thoong's friends, provided information about the videotape. Each of them told police that their friends had informed them that Wiatt had either shown the tape to, or discussed it with, an individual named Barry. Based on this information, the police filed an application and affidavit for a search warrant to search Wiatt's home. The affidavit stated that Ms. Cruz informed police that Thoong told her that "Barry" had viewed a videotape of her having sexual intercourse; Hoy informed police that her friend, Ryan Carlson, told her that "Barry" had discussed the video with Wiatt; and Thoong informed police that she had "heard" that an individual named "Barry" had seen the video.

The court granted the search warrant, permitting police to search for and seize, bedding, clothing, lubricant, video recording equipment, videotapes, photographs, and any other evidence that a crime was committed. Detective Kenneth Clark executed **[*4]** the warrant and found a video camera inside a dresser in Wiatt's bedroom. A videotape was inside the camera. Detective Clark turned the camera on and observed a video recording of Wiatt and Ms. Cruz engaged in intercourse. Detective Clark also found other videotapes and a jar of lubricant in Wiatt's bedroom. Detective Clark seized all of these items.

Prior to trial, Wiatt moved to suppress the evidence obtained from the search of his residence. He argued that the affidavit did not establish probable cause for the search because the information about the videotape provided by Ms. Cruz, Thoong, and Hoy was based on hearsay and not first-hand knowledge. In addition, none of the women had provided Barry's last name, Specht. The court denied the motion, holding that, when taken as a whole, the information provided by the informants was reliable because each of their statements regarding the videotape corroborated the others' statements.

At trial, Ms. Cruz testified that on the evening of June 29, 2001, she and Thoong went to a party at Wiatt's home. At the time, Ms. Cruz was 17 years old and Thoong was 18 years old. Wiatt's younger brother, Jeff Wiatt, had invited them to the residence. **[*5]** Wiatt was not home when Ms. Cruz and Thoong arrived. Jeff, Ms. Cruz, and Thoong began playing a "drinking game." CP at 7. Thoong told detectives that over the course of the evening, Ms. Cruz consumed at least 10 shots of vodka and a mixed alcoholic drink. Thoong also saw Ms. Cruz taking a drink directly from a bottle of vodka. Ms. Cruz told detectives that she had eaten very little during the day before the party and that she was taking medications with warnings not to consume alcohol.

Around 2:00 a.m., Wiatt; his sister, Tammy Wiatt; his cousin, Johan Lo; and several others arrived at Wiatt's residence. At trial, Ms. Cruz testified that when Wiatt returned home, she was "heavily intoxicated." 1 Report of Proceedings (RP) (Oct. 23, 2002) at 81. Shortly thereafter, Tammy, Ms. Cruz, and Thoong decided to go into Wiatt's hot tub. Ms. Cruz testified that after that point, her memory of the evening is "blurry." 1 RP at 81. Thoong testified that Ms. Cruz entered the hot tub wearing all of her clothing. They remained in the hot tub for approximately 15 minutes. Thoong got out of the hot tub first and then went to Ms. Cruz's car to check her cell phone messages and make some **[*6]** calls. A short time later, Tammy and Ms. Cruz left the hot tub. By then, Ms. Cruz was wearing only a shirt and bra. Wiatt brought her a white robe to put on. Ms. Cruz testified that she did not remember taking off her pants in the hot tub.

When Thoong returned, she did not see Ms. Cruz. Thoong asked where Ms. Cruz had gone and was told that she was upstairs in Wiatt's bedroom. Thoong went upstairs and found Wiatt's door locked. She began knocking on the door, yelling that Ms. Cruz was only 17 years old and demanding that Ms. Cruz leave the room. Thoong heard Ms. Cruz say her name twice, but Ms. Cruz did not come out of the room. Ms. Cruz testified at trial that she did not remember anything that occurred while she was in Wiatt's bedroom. After 20 minutes had passed, Thoong became very upset and called Hoy for help.

Hoy informed detectives that she was awakened by Thoong's call at 3:00 a.m. Thoong was "crying hysterically." 4 RP (Oct. 28, 2002) at 664. Thoong told her that Ms. Cruz was drunk and would not come out of Wiatt's bedroom. Thoong wanted to leave and she "[didn't] know what to do." CP at 225. Hoy informed Thoong that she would come pick them up. When Hoy arrived **[*7]** at Wiatt's residence, she saw Ms. Cruz standing outside in a white robe. Hoy went into the house to confront Wiatt. She told him that Ms. Cruz was only 17, that he had raped her, and that he was a "sick perverted f ." CP at 227. During the confrontation, Wiatt's female friends began threatening to "beat" her up if she did not leave. CP at 227. She left the residence and went back outside to meet Ms. Cruz and Thoong. She told Ms. Cruz to get into her car, but Ms. Cruz refused to do so and went back into the house.

Hoy and Thoong waited in Hoy's car for approximately 15 minutes. They called Ms. Cruz's cell phone several times, asking her to leave the house and meet them outside. Each time Ms. Cruz told them that she was coming. Eventually they saw Wiatt's sport utility vehicle (SUV) pull up behind them. The SUV drove a short distance and then returned back to the house. Moments later, they saw Ms. Cruz drive past them in her Honda Accord. Hoy called Ms. Cruz and asked her to pull over, but Ms. Cruz continued driving. At trial, Hoy testified that Ms. Cruz was "swerving all over the road" and Thoong testified that her driving "was really scary." 4 RP at 676; **[*8]** 2 RP (Oct. 23, 2002) at 251. Hoy followed Ms. Cruz on I-5 until they reached Ms. Cruz's exit. They continued to talk on their cell phones during the drive. Ms. Cruz's home is approximately 20 minutes from the Wiatt residence.

Hoy testified that as they approached Ms. Cruz's exit, Ms. Cruz called her and asked her not to pull into her driveway because she was worried that her mother would be "suspicious" if two cars pulled up. 4 RP at 676. Hoy left Ms. Cruz at her exit and drove back to her own home with Thoong. Ms. Cruz testified that she only vaguely remembered driving to her exit. She further testified that she remembers taking her off-ramp and someone calling her on her cell phone, telling her that she could not go into her home wearing a robe with no pants on.

The next thing Ms. Cruz remembered was waking up naked in Wiatt's bed, with Wiatt lying next to her. She testified that she had one memory of the previous evening: she remembered someone on top of her having sexual intercourse. She indicated to the person that she was in pain, and he mentioned something about using lubricant. Ms. Cruz also told detectives during an interview that she vividly remembered **[*9]** being "in so much pain" and that it "hurt so bad." CP at 217. Ms. Cruz testified that when she woke up, she felt "numb" and that she was still slightly feeling the effects of the alcohol she had consumed the previous evening. 1 RP at 93. She got up, found her clothes and keys, and left.

Thoong told detectives that Ms. Cruz called her the following morning at about 8:30 a.m. Ms. Cruz told her that she had fallen asleep in her driveway. But Thoong and Hoy soon learned from another friend that Ms. Cruz had returned to Wiatt's residence. Thoong stated that she believed that Ms. Cruz "was scared to tell [them] . . . she went back." CP at 238. Later that afternoon, Ms. Cruz told Hoy that she woke up in Wiatt's

bed and that she remembered someone having intercourse with her. She said that it hurt "really bad" and that she kept blacking out. CP at 231.

Wiatt testified that throughout the evening on June 29, 2001, he and Ms. Cruz were kissing and hugging each other. Wiatt further testified that after Ms. Cruz got out of the hot tub, they both agreed to go into his bedroom. He entered the bedroom before Ms. Cruz. Lo was in the bedroom. Lo testified that Wiatt handed him a video **[*10]** camera, indicated that he wanted Lo to tape him and Ms. Cruz, and told Lo to get down on the floor. Ms. Cruz entered the bedroom. She and Wiatt began kissing, and Wiatt engaged in foreplay and performed oral sex on Ms. Cruz. Lo taped their interaction. Wiatt believed that she understood what they were doing in the bedroom because she was interacting with him and kissing him. Wiatt and Ms. Cruz left the bedroom when Ms. Cruz's friends began knocking at the bedroom door.

Wiatt testified that Ms. Cruz did not want to leave his house. And while Hoy and Thoong waited outside for her, Ms. Cruz and Wiatt began planning how to "allude [sic] her friends so she could somehow trick them" and return to the house. 10 RP (Nov. 4, 2002) at 1940. Wiatt and Ms. Cruz got into Wiatt's SUV to give the impression that Ms. Cruz was leaving. When Ms. Cruz's friends continued to call her, she decided to drive home in her own vehicle. Wiatt stated that Ms. Cruz's driving was "fine" and that she told him she would come back. 10 RP at 1946.

Wiatt testified that Ms. Cruz was gone for about an hour, and then she called him and asked if she could return. She returned and they began **[*11]** kissing. Ms. Cruz then went up to Wiatt's room while he went to get a drink. When Wiatt came into his bedroom, he saw Ms. Cruz and Lo talking on his bed. Wiatt testified that Ms. Cruz was "putting the moves" on Lo. 10 RP at 1951. He came onto the bed and he and Ms. Cruz began having sexual intercourse. Lo remained on the bed and taped the interaction. Wiatt stated that Lo was approximately one foot away from them on the bed, and he believed that Ms. Cruz was aware that Lo was taping them. Wiatt also testified that he believed Ms. Cruz consented to their intercourse and that she had moved her body with his while they were engaging in intercourse. Lo testified that when Ms. Cruz entered the bedroom she saw him on the bed, and he believed that she was aware of what was happening when she and Wiatt engaged in sexual intercourse.

Wiatt testified that he could tell that Ms. Cruz had been drinking and was not entirely sober, but her motor skills and speech were normal. Lo's testimony was similar to Wiatt's. He testified that Ms. Cruz and Wiatt were "flirting" all evening and that, when he spoke with Ms. Cruz while she was in the hot tub, Ms. Cruz was coherent and could "hold **[*12]** a conversation." 2 RP at 371, 3 RP (Oct. 24, 2002) at 429. However, Ms. Cruz told detectives that at the party, she was "the most intoxicated [she'd] ever been," and at trial, she testified that she was "heavily intoxicated" that evening. CP at 221; 1 RP at 81. Thoong testified that she had never seen Ms. Cruz that intoxicated before and that it was the most she had seen Ms. Cruz drink. In addition, Hoy testified that when she arrived at Wiatt's residence, Ms. Cruz was extremely intoxicated and appeared to be in an "extremely different" state of mind. 4 RP at 670. Hoy also told detectives that Ms. Cruz "didn't look like [her] friend at all," her speech was slurred, and she was using expressions that she had never used before. CP at 230.

During the trial, the jury also viewed the videotape, which had been converted to digital video disk (DVD). The DVD depicted both incidents that occurred while Ms. Cruz was in Wiatt's bedroom.

Wiatt was charged with two counts of second degree rape for engaging in sexual intercourse when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; two counts of sexual **[*13]** exploitation of a minor with sexual motivation; and two counts of voyeurism. After Ms. Cruz reported the incident, the news media reported that there may have been another video. Several additional young women came forward and reported that they, too, had been raped by Wiatt. One of these women, R. Rankis, reported an incident that occurred in 2000.

II. R. Rankis

In late July or early August 2000, at 10:00 p.m., R. Rankis, a 17-year-old female, went to a party at Wiatt's house with her friend, Alicia Cochran. Wiatt was serving drinks. Over a period of about two hours,

Ms. Rankis consumed two to three mixed alcoholic drinks and four shots of liquor. In addition, Ms. Rankis and Cochran ingested a few lines of cocaine. Ms. Rankis testified that she and Cochran ingested the cocaine in Wiatt's bathroom so that no one at the party would see them using the drug.

Ms. Rankis testified that throughout the evening, Wiatt flirted with her and told her that she was pretty. She felt flattered. At one point, Wiatt asked her if she would like to see something in his bedroom. Ms. Rankis agreed and they went upstairs to his room. They laid down on his bed and he began kissing her. Ms. Rankis testified **[*14]** that she did not think that she had any reaction when Wiatt kissed her and did not know whether the kissing was mutual. She further testified that she did not feel "normal" and that she felt relaxed and uninhibited. 4 RP at 734. She vaguely remembered Wiatt taking off her clothes and she may have giggled. Wiatt then began engaging in sexual intercourse with her, and she became alert. Ms. Rankis testified that when Wiatt "started having sex with [her] [she] said no, no, no," but Wiatt continued penetrating her and said "something like you want to do this, you like it." 4 RP at 735. Ms. Rankis stated that she felt like she could not move her body and that she felt "more intensely drunk" than she usually felt after consuming alcohol. 4 RP at 735.

Ms. Rankis next remembered someone "banging" on Wiatt's door. 4 RP at 735. She saw Cochran standing over her. Cochran helped her find her clothes and they left Wiatt's house. Ms. Rankis had no memory of walking to Cochran's car, and felt "dazed" while Cochran was driving. 4 RP at 737. Ms. Rankis testified that she did not believe that she was coherent when she and Wiatt were **[*15]** engaging in sexual intercourse. She did not contact police to report the incident until she learned that similar charges had been filed against Wiatt because she felt that it was "maybe . . . [her] fault" for not "fight[ing] it off" and because she "[went] upstairs in the first place." 4 RP at 785, 738-39.

After Ms. Rankis and Cochran left Wiatt's residence, Cochran drove to a party at another friend's home. Ms. Rankis testified that she realized that Cochran wanted to use more cocaine, and that once she was inside the house, she went upstairs to lie down. Ms. Rankis does not remember whether she ingested more cocaine at the second party.

Wiatt testified that Ms. Rankis had been to his house several times prior to the night in question. On that night, Wiatt and Ms. Rankis were on his couch kissing, when they decided to go up to his bedroom. Inside the bedroom, they started undressing and Ms. Rankis asked him to put on a condom. Wiatt testified that they engaged in consensual intercourse and that Ms. Rankis never expressed that she did not want to participate.

During intercourse, Cochran came to the door and asked Ms. Rankis if she wanted to leave. Ms. Rankis replied **[*16]** that she was "fine" and did not want to leave. 10 RP at 1964. Additionally, Wiatt testified that Ms. Rankis was giggling "like it was funny." 10 RP at 1964. After Wiatt and Ms. Rankis finished, Cochran came in and helped Ms. Rankis find her clothes. Wiatt asked Ms. Rankis why she was leaving so fast, and she replied that she wanted to go get more cocaine.

Wiatt testified that he was aware that Ms. Rankis had used cocaine during the evening and that she was acting like "Superwoman running around." 10 RP at 1965. He further testified that she did not appear to be incapacitated and that she had no trouble moving or understanding what was happening. In addition, Wiatt stated that he and Ms. Rankis engaged in consensual sexual intercourse after that evening-once more in his bedroom and once in his vehicle. She consented each time.

Crystal Phillips, a friend of Ms. Rankis, also testified. She stated that she had seen Ms. Rankis at Wiatt's house approximately four different times. On one of these occasions, Ms. Rankis told Phillips that Wiatt was "hot" and that she wanted to "sleep" with him. 10 RP at 1986. Phillips testified that when **[*17]** Ms. Rankis told her this, Ms. Rankis appeared clumsy and her speech was slurred. Additionally, Justin Allison, a friend of Wiatt, testified that Ms. Rankis told him that she was interested in having sexual relations with Wiatt.

Wiatt was ultimately charged with five counts of second degree rape, one count of third degree rape of a child, two counts of third degree rape, four counts of sexual exploitation of a minor, four counts of

voyeurism, one count of communication with a minor for immoral purposes, one count of unlawful imprisonment with sexual motivation, and eight counts of furnishing liquor to a minor. These charges involved 10 different women. The court severed 18 counts from the others for trial. These 18 counts, which are the subject of this appeal, involve four women-H. Kalmikov, K. Hoskins, Z. Hawkins, and J. Bowles-in addition to Ms. Cruz and Ms. Rankis. Wiatt pleaded guilty to one count of voyeurism and to the count of communication with a minor for immoral purposes. The remaining charges were dismissed.

Johan Lo was also charged with two counts of sexual exploitation of a minor and two counts of voyeurism. Lo pleaded guilty to one count of attempted voyeurism in exchange **[*18]** for his testimony against Wiatt.

III. Trial Motions

During Wiatt's trial, the State moved to prohibit the defense from asking Lo any questions regarding whether he also had sexual contact with Ms. Cruz or whether he had erased any portion of the videotape showing that contact. The court granted the motion, holding that no evidence existed to show that Lo engaged in sexual contact with Ms. Cruz and that such a line of questioning would be irrelevant as to whether Wiatt raped Ms. Cruz.

In addition, Wiatt moved to prohibit the State and any witness from referring to or suggesting that Wiatt had possessed or used "date rape drug[s]." CP at 54. Wiatt argued that the State did not discover any evidence that he had ever possessed or provided date rape drugs. The State agreed not to present any evidence of or question any witnesses about date rape drugs.

IV. Closing Arguments

Near the end of the trial, the jury again viewed the DVD of Wiatt and Ms. Cruz. Both the State and the defense made closing arguments to the jury regarding the DVD. During the State's argument, the prosecutor made the following argument:

> [A]t any point if she loses consciousness, if she passes out, then **[*19]** what might have even been a consensual act to start with becomes a rape because she no longer has the ability to make the decision, to make the choice, and to articulate that.

12 RP (Nov. 5, 2002) at 2369.

After the arguments, defense counsel moved the court to instruct the jury that the prosecutor's statements were improper. Defense counsel argued that the prosecutor had misstated the law by arguing that, if a sexual partner consents to having sex and then falls asleep during intercourse, the other partner is guilty of rape. The court declined to give a jury instruction, finding that it might be commenting on the evidence if it instructed the jury to decide anything regarding Ms. Cruz's mental capacity to consent based on the DVD. Rather, the court ruled that the State was prohibited from repeating its argument during closing arguments and that the defense could argue that the prosecutor had misstated the law.

During closing arguments the prosecutor also argued:

> So let's say you were to come out from your deliberation and say, well, we've found that we believe these girls, we believe what they said, but we had reasonable doubt. Well, I submit to you, that **[*20]** those are legally incompatible statements, they are legally incompatible statements because if you believe these girls, then you believe the truth of the charge.

13 RP (Nov. 6, 2002) at 2415-16. Defense counsel did not object to these remarks.

V. Jury Deliberations

During deliberations, the jury sent the court the following inquiries:

> Question re: Instruction No. 11 "Freely given"
>
> If when a person of age enters into an agreement, and it can be demonstrated that this same person is in an altered state of mind at the time of said agreement;
>
> Does this meet the test, i.e. legal definition of having FREELY entered into the agreement?

CP at 95.

> In the definition of "physically helpless" a person is deemed helpless if they are physically unable to communicate unwillingness to act.
>
> Question 1: Does this mean that at any point in time during an incident if a person becomes unconscious than [sic] they meet the criteria of being "physically helpless"[?]
>
> Question 2: Same question as above except apply it to the definition of "mental incapacity." If a person meets the definition of "mental incapacity" at any point in time during an incident, **[*21]** is that all that is required in finding a person guilty of rape in the second degree [?]

CP at 94.

In response to the jury's questions, Wiatt requested that the court give the jury additional instructions that helplessness or incapacity must exist at the time an interaction begins and that, as to the meaning of "freely given," the jury re-read instructions 9 and 10. Clerk's Minutes (11/12/02) (see spindle). The court denied Wiatt's request and instructed the jury to re-read the jury instructions.

Also during deliberations, members of the jury discussed date-rape drugs. After Wiatt's trial had concluded, juror no. 6 informed Larry Freeman, an investigator for Wiatt's defense counsel, that the "subject of date rape drugs came up" during deliberations because he and other members of the jury felt there "must be another reason to explain the physical condition of the victims, given the fact that if they only had a few drinks they would not have been incapacitated as they described." CP at 133. Juror no. 6 stated that he had seen shows describing date-rape drugs on various television programs, including "America's Most Wanted," "The New Detectives," and a program on The Learning **[*22]** Channel. CP at 133. He informed the jury about information he had learned from the programs: date-rape drugs dissolve completely in drinks, they do not have an aftertaste or leave a film or milkiness in a drink, and some date-rape drugs do not "show up" in blood tests. CP at 134. He also told the jury that "it was possible for someone to have put a date[-]rape pill in a victim's drink without the victim's knowledge." CP 134.

In addition, juror no. 10 informed Mr. Freeman that the jury had considered date-rape drugs. She told the jury that she thought date-rape drugs might have been involved because "some of the girls . . . testified that they had drunk alcohol before but had never felt the way that they did at the Wiatt house." CP at 134. She also stated that Wiatt might have had a "system" and that it would only take a second to put a drug into a drink. CP at 134. Juror no. 3 informed Mr. Freeman that the jury had discussed the fact that a drink the girls described, called "Sex on the Beach," was a "colorful drink that could mask any milky appearance" and that the drink had a "fruity taste that could hide a date rape drug." CP at 135.

Other jurors confirmed these discussions, **[*23]** and most expressed a belief that at least some of the victims had been given date-rape drugs. The jury discussed whether it could consider the possibility that date-rape drugs were involved, given that there had been no evidence of any date-rape drugs at trial. The jury concluded that information regarding the use of date-rape drugs was circumstantial evidence that it was permitted to consider in determining Wiatt's guilt.

Upon discovering this information, Wiatt moved for a new trial based on juror misconduct. He argued that the jury had improperly considered extrinsic evidence in determining its verdict. The court denied the motion, holding that information about date-rape drugs is within common knowledge, and the jury could

infer the use of these drugs based upon common experience.

The jury convicted Wiatt on all counts but count I, second degree rape of Ms. Cruz (the first incident between Wiatt and Ms. Cruz), and count XI, unlawful imprisonment with sexual motivation of H. Kalmikov. In addition, the jury found Wiatt not guilty of count X, third degree rape of H. Kalmikov, but it convicted him of the lesser included charge of attempted third degree rape of H. Kalmikov.

VI. Sentencing

[*24] In Wiatt's plea agreement on counts XXII, voyeurism, and XXIV, communication with a minor for immoral purposes, the State agreed to dismiss the remaining five charges against Wiatt. Additionally, the State agreed to recommend no more than 12 months incarceration to run concurrently with sentences on all other counts. In total, Wiatt was convicted of, or pleaded guilty to, 10 felonies and 8 gross misdemeanors.

At sentencing, the prosecutor recommended that the court impose an exceptional sentence under former RCW 9.94A.390(2)(i) (2000), recodified as RCW 9.94A.535(2)(i) (2001), [2] arguing that most of Wiatt's sex offenses could not be considered in calculating his standard range and would essentially constitute "free crimes." RP (March 31, 2003) at 21. Additionally, the prosecutor argued that, because misdemeanor convictions are not counted in determining a defendant's offender score, Wiatt's gross misdemeanor convictions would also become "free crime[s]." RP (Mar. 31, 2003) at 14. The prosecutor further recommended that the court run Wiatt's sentence for the gross misdemeanor convictions concurrently **[*25]** with his sentence for the felony convictions and that it impose a sentence of 560 months incarceration.

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[2] *HN1* Under former RCW 9.94A.390(2)(i) (2000), a court may impose an exceptional sentence if the operation of the "multiple offense policy" of former RCW 9.94A.400, recodified as RCW 9.94A.589 (2001), results in a presumptive sentence that is "clearly too lenient."

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The court sentenced Wiatt to one year for each of his eight gross misdemeanor convictions, to run consecutively with his felony convictions. In addition, the court imposed an exceptional sentence, finding that the operation of the SRA's "multiple offense policy" would result in a sentence that is "clearly too lenient." CP at 292. The court reasoned that, under the maximum standard range possible under the SRA, only Wiatt's first four felony sex convictions would be punished; thus, an exceptional sentence was justified. In its findings of fact, the court indicated **[*26]** that it had only considered Wiatt's felony sex charges in imposing an exceptional sentence. Further, the court stated at the sentencing hearing that it had disregarded count XXII, voyeurism, in imposing an exceptional sentence because Wiatt had pleaded guilty to this offense. Wiatt's timely appeal follows.

ANALYSIS

I. Motion to Suppress

Wiatt first contends that the trial court erred in denying his motion to suppress evidence obtained during the search of his home. Specifically, he argues that the videotape depicting Ms. Cruz and him was improperly admitted because neither Ms. Cruz, Thoong, or Hoy had any basis of knowledge that the tape existed. In response, the State argues that the warrant was properly issued because each of the informants provided the same ultimate source of the information: Wiatt. Wiatt is correct.

HN2 We review the validity of a search warrant for abuse of discretion, giving great deference to the issuing magistrate. *State v. Jacobs*, 121 Wn. App. 669, 676, 89 P.3d 232, *review granted in part*, 152 Wn.2d 1036, 103 P.3d 202 (2004). Abuse of discretion is shown where a court's decision is manifestly

unreasonable, or exercised on untenable grounds **[*27]** or for untenable reasons. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990), *review denied*, 116 Wn.2d 1014, 807 P.2d 883 (1991). HN3 Generally, a warrant is valid if a reasonable, prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched. *State v. Wible*, 113 Wn. App. 18, 21, 51 P.3d 830 (2002). As long as the basic requirements are met, we review an affidavit in a commonsense, not hyper-technical manner. *Wible*, 113 Wn. App. at 21. Doubts should be resolved in favor of the warrant. *Wible*, 113 Wn. App. at 21-22.

HN4 Washington applies the two-pronged *Aguilar-Spinelli* test to determine whether information provided by an informant establishes probable cause to issue a search warrant. *Jacobs*, 121 Wn. App. at 677; *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). The affidavit must sufficiently identify the basis **[*28]** for the informant's information and establish the informant's credibility. *Jacobs*, 121 Wn. App. at 677. If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. *State v. Bauer*, 98 Wn. App. 870, 875, 991 P.2d 668, *review denied*, 140 Wn.2d 1025, 10 P.3d 406 (2000). Here, Wiatt concedes that Ms. Cruz, Thoong, and Hoy, all named, citizen informants, are credible. But he contests the reliability of the persons these three mentioned: Nicole Smith, Nick Deor, Ryan Carlson, "Barry", and Wiatt, because they did not inform the police about the videotape nor did they permit their identities to be disclosed. Therefore, Wiatt argues that their veracity is not established, and they are not reliable as citizen informants, citing *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002).

We must determine whether a sufficient basis exists to support the statements made by Ms. Cruz, Thoong, and Hoy regarding the videotape. HN5 To satisfy the "basis of knowledge" prong, an informant must declare that he or she **[*29]** personally has seen the facts asserted and is passing on first-hand knowledge. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). In addition, where an informant's information is based on hearsay, this hearsay-upon-hearsay is acceptable so long as both levels of hearsay satisfy the *Aguilar-Spinelli* test. 2 Wayne R. La Fave, Search and Seizure § 3.3(d) (1978).

Here, each of the informants' information regarding the videotape was hearsay. Ms. Cruz told detectives that Nicole Smith told her that she had been informed by Nick Deor that Ms. Cruz was "caught on video[] tape and . . . was tag teamed by two guys." CP at 219. In addition, Ms. Cruz informed detectives that Thoong told her that she had heard that Wiatt had showed "Barry" a videotape of himself and a girl doing it "dogg[y] [style]" and that "they" had figured out that it was Ms. Cruz. CP 219. Thoong told detectives "some guy named Barry" had seen a videotape of Ms. Cruz and Wiatt doing it "doggy style." CP at 240. Hoy told detectives that her friend, Ryan Carlson, had informed her that he spoke with "Barry Speck," [3] and "Barry" had told Ryan that Wiatt told him about a video that Wiatt **[*30]** filmed of himself and Ms. Cruz. CP at 232. Hoy further told detectives that "Barry" had not actually seen the video. CP at 233. In the affidavit for search warrant, Detective Louise Adams restated the information given to her from each of the informants.

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3 Hoy told detectives that she thought "Barry's" last name was Speck, but she was not really sure.

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This information is insufficient to demonstrate that any of the three informants (Ms. Cruz, Hoy, or Thoong) had a basis of knowledge that such a tape existed. None of them had first-hand knowledge of a videotape; none of them professed to have seen the tape or even to have seen video equipment at Wiatt's home. Additionally, none of them had first-hand knowledge of Ms. Cruz having sex with two men, or in the positions described. Further, the hearsay itself-that an individual named "Barry" had either seen the video or discussed it with Wiatt-lacks a sufficient basis of knowledge. Thoong simply "heard" that a "guy named Barry" had seen a video of Ms. Cruz and **[*31]** Wiatt having intercourse; Ms. Cruz was simply told by Ms.

Smith that such a video may exist. And while Hoy was told by her friend, Ryan, that he had been told by Barry that Barry had discussed the video with Wiatt, Ryan lacked any personal, first-hand knowledge that the video existed. Moreover, none of the information given by the informants could lead a reasonable person to believe that the videotape would be found at Wiatt's house. None of the informants had heard where Barry had viewed the video or that the video and other video equipment was being stored at Wiatt's residence.

In addition, the affidavit contains no facts showing how a detached magistrate could conclude that each level of hearsay was reliable. HN6 An informant's veracity is established when the informant provides firsthand details and is a named citizen. *Tarter*, 111 Wn. App. at 340. Even conceding that Ms. Cruz, Hoy, and Thoong were reliable as citizen informants, their naming of individuals does not imbue those named with veracity or reliability. One of the primary purposes for the Court's ruling in *Spinelli* was to ensure that the issuing magistrate is "relying on something more substantial than **[*32]** a casual rumor circulating in the underworld." *Spinelli*, 393 U.S. at 416. Without any showing of first-hand knowledge or reliability for each of the persons who passed on information about the video, the affidavit established nothing more than a rumor that Wiatt either showed or discussed with Barry a video involving him and Ms. Cruz. Thus, the reliability prong requirement of *Aguilar-Spinelli* is also not satisfied for the chain of information provided to Ms. Cruz, Hoy, and Thoong.

Furthermore, although Detective Adams clearly did some independent investigation, as she correctly identified Barry's last name, Specht, in her affidavit, she provides absolutely no information to the court as to how she obtained this information. And there is no other evidence that Detective Adams conducted any further investigation regarding whether Wiatt had taped Ms. Cruz or even possessed video equipment. Thus, the informants' information lacks a sufficient basis of knowledge regarding the existence of the videotape, and the affidavit fails to demonstrate the reliability of the persons named by three informants or a nexus between the tapes and Wiatt's home. The trial court erred **[*33]** in granting the police a warrant to search for video equipment and tapes at Wiatt's house.

But as the State correctly points out, the affidavit did establish probable cause to search Wiatt's bedroom for evidence of the rape of Ms. Cruz, irrespective of the information about the videotape, because Ms. Cruz reported that she had been raped in Wiatt's bedroom and that he had mentioned using a lubricant. *See State v. Johnson*, 104 Wn. App. 489, 501, 17 P.3d 3 (2001) (holding that where a warrant validly permitted police to search for evidence of a rape, but invalidly permitted police to search for videotapes, the warrant was severable-it was valid as to evidence of the rape but invalid as to the videotapes). The State contends that, even if the affidavit lacked probable cause to permit a search for video equipment and tapes, the police properly seized the videotape under the doctrines of plain view and inevitable discovery.

First, the State argues that in searching Wiatt's room for evidence of a rape and lubricant, the police validly discovered and seized the video camera and tapes under the plain view doctrine. At trial, Detective Clark testified that upon entering Wiatt's **[*34]** bedroom, he began searching for a video camera, lubricant, and other evidence of a rape. Inside Wiatt's dresser drawers, Detective Clark found a video camera and "Slippery Stuff" lubricant. 3 RP at 492. Detective Clark seized the video camera and discovered that it contained a videotape. He turned the camera on and observed a recording of Wiatt and Ms. Cruz engaging in sexual acts. When asked whether he had photographed the camera inside the dresser, Detective Clark responded, "Yes. I eventually, once I discovered it was evidence, I then placed it back where I found it and then took a picture of it." 3 RP at 485.

HN7 The plain view doctrine allows officers to seize an item without a warrant, if while acting in the scope of an otherwise authorized search, they acquire probable cause to believe that the item is evidence of a crime. *Johnson*, 104 Wn. App. at 501. The doctrine does not allow an additional, unauthorized search; police must have "'immediate knowledge'" that they have incriminating evidence before them. *Johnson*, 104 Wn. App. at 501 (quoting *State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303 (1974), **[*35]** *cert. denied*, 421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975)). *Johnson* is instructive.

In that case, two minors reported that the defendant had raped them, and one of the victims stated that the defendant had used a vibrating massager to sexually assault her. *Johnson*, 104 Wn. App. at 492. A

magistrate granted a warrant permitting police to search inside the defendant's home for evidence of "sex toys," including a vibrating massager and "movies . . . depicting nudity and/or sexual activity." *Johnson*, 104 Wn. App. at 493. During the search, the police discovered an unmarked videotape in the defendant's bedroom, placed the tape into a video cassette recorder to view, and watched what appeared to be a male hand fondling a sleeping child's genitalia. *Johnson*, 104 Wn. App. at 495. The police seized the tape and other tapes, and the defendant was ultimately convicted of unlawfully possessing pictures of a minor engaged in sexually explicit conduct. *Johnson*, 104 Wn. App. at 496.

We held that the warrant improperly authorized the police to search for videotapes and that the police had illegally seized and viewed **[*36]** the video-unless the evidentiary nature of the tape appeared in plain view during a search for the massager. *Johnson*, 104 Wn. App. at 501. We found that, even though the police were legally in the defendant's home under the warrant, and even if they had discovered the videotapes while they were searching for the massager, the plain view doctrine did not justify their conduct in seizing and viewing the tape because they did not have immediate knowledge that the videotape was evidence of a crime. *Johnson*, 104 Wn. App. at 501-02. The exterior of the unmarked videotapes did not give probable cause to believe that the tapes might be evidence of a crime, and when the police viewed the incriminating tape to acquire probable cause, they engaged in an additional unauthorized search. *Johnson*, 104 Wn. App. at 502.

Similarly, in this case, the video camera, while properly discovered in Wiatt's dresser along with lubricant, did not give probable cause to believe that it was evidence of a crime. As stated by the trial court during Wiatt's suppression hearing, "simply having a video camera is not illegal." RP (Oct. 4, 2002) at 112. **[*37]** But the State argues that this case is distinguishable from *Johnson* because here, Ms. Cruz, Thoong, and Hoy made statements to detectives that they had heard that Wiatt had shown or discussed taping Ms. Cruz with Barry Specht. The State contends that based on these statements, Detective Clark could immediately recognize the video camera as evidence of a crime. This argument fails in two respects. First, no one, including the informants, suggested to the police that Wiatt actually owned video equipment that he stored in his home. [4] Second, the police did not have probable cause based on the informants' statements to believe that Wiatt had taped himself and Ms. Cruz engaging in sexual activity.

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4 During a police interview that occurred *after* the police had searched Wiatt's home, Barry Specht informed detectives that Wiatt owned a video camera that he used to tape parties and his vacations.

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As in *Johnson*, Detective Clark did not have probable cause to seize the video camera and the unlabeled videotape **[*38]** [5] contained inside of it until he viewed the tape. Detective Clark testified at trial that "once [he] *discovered* it was evidence," he took a picture of the camera. 3 RP at 485 (emphasis added). Presumably then, Detective Clark did not immediately know that the camera was evidence of a crime, but discovered that it was after viewing its contents. And in doing so, Detective Clark engaged in an additional unauthorized search. Thus, Detective Clark's illegal search and seizure of Wiatt's video camera and videotape does not fall under the plain-view exception to the warrant requirement, and these items should have been suppressed at trial.

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5 None of the evidence in the record shows that the tape was unlabeled. However, during the hearing on Wiatt's motion to suppress, the court accepted as an offer of proof Wiatt's argument that the tape was unlabeled. The State did not object.

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In addition, the State contends that the video camera and videotapes were properly admitted by the trial court **[*39]** because police would have inevitably discovered these items during the course of their

investigation. But the State provides no argument on appeal to support this contention. At the suppression hearing, the State argued that even if the warrant had not permitted the police to search for video equipment and videotapes, they would have inevitably discovered the camera while searching for lubricant in Wiatt's dresser. This argument also fails.

HN8 Evidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State proves by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery and that the evidence would have been inevitably discovered under proper and predictable investigatory procedures. *State v. Avila-Avina*, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). The State must show that the legal means of obtaining the evidence would have been "'truly independent'" of the illegality and that the discovery by those means would have been "'truly inevitable.'" *Avila-Avina*, 99 Wn. App. at 18 (quoting *United States v. Silvestri*, 787 F.2d 736, 744 (1st Cir. 1986)). **[*40]** The rule allows neither speculation as to whether the evidence would have been discovered nor speculation as to how it would have been discovered. *Avila-Avina*, 99 Wn. App. at 18.

Here, at the suppression hearing, the State merely argued that police would have discovered the video camera and tapes in the same illegal manner that the camera and videotapes were actually discovered. As previously discussed, the police were not permitted to seize the video camera under the plain view doctrine. Moreover, the State provided no evidence that, regardless of the defective warrant, the police were in the process of conducting investigations that likely would have given them probable cause to search and seize Wiatt's video equipment and videotapes. Thus, the State has failed to prove by a preponderance of the evidence that the police would have inevitably discovered Wiatt's video camera and videotapes through constitutional means independent of the illegal search of these items.

In conclusion, the search warrant was erroneously issued as to the video recording equipment and videotapes, and the trial court erred by admitting these items into evidence at trial. We must remand **[*41]** counts II through VI [6] for re-trial without this evidence. [7] Wiatt argues that this court must also reverse all remaining counts due to the "prejudice inherent in trying the multiple counts together." Br. of Appellant at 94. This argument is without merit, as the videotape only depicted Ms. Cruz and was not associated with the counts involving the other victims. Moreover, the jury acquitted Wiatt of count I, second degree rape of Ms. Cruz, despite having viewed the incident on the tape. Thus, it is not probable that the jury convicted Wiatt for the crimes against any other victim based on this videotape.

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6 These counts are as follows: count II, second degree rape of Ms. Cruz; counts III and IV, sexual exploitation of a minor with sexual motivation involving Ms. Cruz; and counts V and VI, voyeurism involving Ms. Cruz.

7 HN9 Where we reverse a conviction and remand for a new trial, the double jeopardy clause is ordinarily not offended. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205, *cert. denied*, 459 U.S. 842, 74 L. Ed. 2d 85, 103 S. Ct. 93 (1982). If the reversal is not for insufficiency of evidence, the defendant may be retried for the convicted offense and any lesser included offenses. *Anderson*, 96 Wn.2d at 742. As noted later in this opinion, we do not reverse the counts involving Ms. Cruz for insufficiency of the evidence.

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[*42] II. Juror Misconduct

Wiatt next asserts that he is entitled to a new trial due to juror misconduct. He argues that no evidence of date-rape drugs was presented at trial and, in discussing date-rape drugs, the jury impermissibly injected extrinsic evidence into its deliberations. The State responds that knowledge about date-rape drugs is within common knowledge and that, based on some of the victims' testimony, it was reasonable for jurors to infer from their common experience the possibility of date-rape drugs being used in the commission of the rapes. In addition, the State argues that Wiatt invited the jury to consider the possibility of date-rape drugs. We agree.

Here, although neither party presented direct evidence that date-rape drugs may have been involved in the rapes, the jury could reasonably infer, based on common knowledge about alcohol and date-rape drugs, the possibility of these drugs as circumstantial evidence. K. Hoskins testified that, despite having consumed one alcoholic beverage at Wiatt's home, she had no memory of having sexual intercourse with Wiatt. And Z. Hawkins testified she had only consumed two to three alcoholic beverages and that, although she was **[*43]** cognizant of what was happening, she could not move her body while Wiatt engaged in sexual intercourse with her. Based on this testimony, the jury could rationally infer that the use of date-rape drugs may have been an alternative reason for some of the victims' sudden incapacitation.

Moreover, during closing arguments Wiatt invited the jury to consider alternate explanations for the victims' incapacitation. In discussing the charges involving Ms. Cruz, Wiatt challenged her inability to recall certain details, referring to it as "selective blackouts," and invited the jury to "consider this selective loss and *question whether alcohol works that way*." 13 RP at 2503 (emphasis added). Similarly, in discussing Ms. Hoskins' testimony that she was incapacitated after having only one drink, Wiatt argued, "[t]here's *absolutely no explanation about her lack of memory*." 13 RP at 2552 (emphasis added). Wiatt also challenged the credibility of Ms. Hawkins' testimony that she was incapacitated after consuming only two to three bottles of beer. Finally, in reference to several of the victims, Wiatt argued, "how can we have the selective memory as these women have? **[*44]** " 13 RP at 2566. In short, while Wiatt urged the jury to question the credibility of these women, he also invited it to inquire into the possible effects of alcohol and to consider whether something else might have caused the victims' memory loss and incapacitation. Having invited the jury to so inquire, Wiatt is now barred from complaining of that inquiry on appeal.

III. Sufficiency of the Evidence

Wiatt contends that insufficient evidence supports the jury's finding that he committed rape in the second degree of Ms. Cruz as charged in count II and rape in the third degree of R. Rankis as charged in count XVI. We address sufficiency as to count II, even though we reversed the conviction, because we remand the issue for trial, which is appropriate under *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205, *cert. denied*, 459 U.S. 842, 74 L. Ed. 2d 85, 103 S. Ct. 93 (1982). Sufficient evidence exists to support both Wiatt's conviction of second degree rape and his conviction of third degree rape.

HN10 Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential **[*45]** elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). "A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact regarding a witness's credibility or conflicting testimony. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. *Count II*

Wiatt was charged with second degree rape pursuant to HN11 RCW 9A.44.050(1)(b), which requires the State to prove that, under circumstances not constituting rape in the first degree, the defendant engaged in sexual intercourse with another person when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. "Mental incapacity" is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that **[*46]** condition is produced by the influence of a substance, illness, defect, or from some other cause. RCW 9A.44.010(4). "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. RCW 9A.44.010(5).

Here, Thoong testified at trial that over the course of the evening of June 29, 2001, Ms. Cruz consumed at least "six or more" shots of vodka and a mixed alcoholic drink. 2 RP at 235. Ms. Cruz testified that she has very little memory of what occurred that evening; however, she remembers a person on top of her, having sexual intercourse at one point during the evening. She indicated to the person that she was in pain and he said something about using lubricant. She next remembers waking up in Wiatt's bed, completely naked. In

addition, Ms. Cruz testified that she was "heavily intoxicated" on the evening she was raped, 1 RP at 81; Thoong testified that she had never seen Ms. Cruz this intoxicated before and that it was the most she had seen Ms. Cruz drink; and Hoy testified that when she arrived at Wiatt's residence, Ms. Cruz was extremely **[*47]** intoxicated and appeared to be in an "extremely different" state of mind. 4 RP at 670.

In contrast, Wiatt testified that he could tell that Ms. Cruz had been drinking and was not entirely sober but that her motor skills and speech were normal. Lo testified that Ms. Cruz and Wiatt were "flirting" all evening and that, when he spoke with Ms. Cruz while she was in the hot tub, Ms. Cruz was coherent and could "hold a conversation." 2 RP at 371, 3 RP at 429. In addition, Wiatt testified that he believed that Ms. Cruz consented to having sexual intercourse and that she had moved her body with his while they were engaging in intercourse. Lo testified that, based upon his observation of Wiatt and Ms. Cruz, he believed Ms. Cruz was aware of what was happening when she and Wiatt engaged in sexual intercourse.

Wiatt argues that that Ms. Cruz's behavior during their first encounter in his bedroom shows that she understood the nature and consequences of her actions. But Wiatt was not convicted on count I involving this initial incident, and Ms. Cruz's statements or actions at that time are irrelevant as to whether the evidence is sufficient to support a finding that **[*48]** Wiatt raped her during their second encounter. Wiatt further argues that Ms. Cruz's actions in driving 20 minutes to her home to "appease or deceive" her friends and then driving back to Wiatt's home, making numerous cell phones during the trip, demonstrated her physical ability and mental willingness to rejoin him. Br. of Appellant at 64. This argument is without merit.

Here, there was a direct conflict in the evidence regarding Ms. Cruz's state of mind and ability to consent to sexual intercourse; credibility was thus the central question. Despite hearing testimony that Ms. Cruz was a coherent and willing sexual partner, the jury ultimately found Ms. Cruz's testimony that she was heavily intoxicated and remembered very little about her evening-including having sexual intercourse with Wiatt-to be more credible. This determination is not reviewable. *See* *Camarillo*, 115 Wn.2d at 71. Ms. Cruz's testimony alone, without consideration of the videotape, is sufficient to support Wiatt's conviction of second degree rape. Even if Ms. Cruz made a 40-minute, round-trip drive, made several phone calls, and returned to Wiatt's home, her testimony supports a reasonable inference **[*49]** that she was so intoxicated, she did not and could not truly understand the nature and consequences of either her own or Wiatt's actions.

B. *Count XVI*

Wiatt was charged with third degree rape pursuant to RCW 9A.44.060(1)(a). *HN12* Under that statute, a person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degree, such person engages in sexual intercourse with another person, and the victim did not consent to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a). "Consent" means that, at the time of the sexual contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse. RCW 9A.44.010(7).

Wiatt argues that Ms. Rankis did not express a lack of consent by words or conduct until after they were engaged in sexual intercourse. He further argues:

> Once intercourse is begun without saying "no," merely saying "no" does not clearly express a lack of consent. In the throes of sexual intercourse, "no" becomes ambivalent **[*50]** at best. It may be an exclamation, or feedback as passion builds to the "yes" of climax.

Br. of Appellant at 81.

In addition, Wiatt contends that once Ms. Rankis expressed her lack of consent, he was not committing rape by continuing intercourse because the law must permit an "appreciable amount of time in which a sexual partner can perceive and understand such a communication, and physically respond." Br. of Appellant at 82. These arguments are entirely without merit.

First, as previously discussed, HN13 RCW 9A.44.010(7) requires that, for an individual to consent to sexual intercourse, he or she must use actual words or conduct indicating freely given agreement *at the time of the sexual contact*. There is no language in the statute indicating that consent, or lack thereof, must be communicated prior to commencement of sexual intercourse, and Wiatt offers no legal authority for this proposition. Second, Ms. Rankis testified that she said "no" when Wiatt "*started having* sex" with her; thus, she and Wiatt were not in the "throes of sexual intercourse," such that it might be difficult for Wiatt to determine whether she truly meant to express a **[*51]** lack of consent. 4 RP at 735 (emphasis added); Br. of Appellant at 81. Finally, Ms. Rankis testified that when she told Wiatt "no," he responded by staying "something like you want to do this, you like it." 4 RP at 735. This evidence demonstrates that Wiatt perceived and understood Ms. Rankis' communication that she did not want to have sex, and he chose to continue having intercourse with her despite her clearly expressed lack of consent.

Here again, the jury was presented with conflicting testimony. Ms. Rankis testified that Wiatt continued engaging in sexual intercourse with her after she clearly expressed a lack of consent to him, while Wiatt testified that he and Ms. Rankis had engaged in consensual intercourse and that Ms. Rankis never expressed that she did not want to have sex. The jury ultimately found Ms. Rankis to be more credible, and this determination is not reviewable. *See Camarillo*, 115 Wn.2d at 71.

IV. Trial Court Error

Wiatt next asserts that the trial court committed several reversible errors. He argues that the trial court erred when it (1) failed to correct the prosecutor's misstatement of law; (2) commented on the **[*52]** evidence in its jury instructions; (3) instructed the jury as to uncharged alternative means of committing sexual exploitation of a minor; and (4) gave erroneous jury instructions regarding "freely given" consent. Br. of Appellant at 75. We address each argument in turn.

Wiatt first contends that the prosecutor misstated the law during closing arguments prior to the jury's second viewing of the DVD when he essentially stated that, even if an individual initially consents to sex, if he or she loses consciousness at any point during intercourse, the other partner begins committing rape. Because this issue only pertains to the count involving Ms. Cruz and because we reverse all convictions regarding Ms. Cruz, we do not address this argument.

Second, Wiatt argues that the court impermissibly commented on the evidence in its instructions to the jury. Specifically, he objects to the term "offense" in instructions 9, 13, and 22; the term "victim" in instructions 6 and 29; and the term "perpetrator" in instruction 29. Wiatt argues that by instructing the jury in this language, the court conveyed an opinion that a crime had occurred: there was an "offense," a "perpetrator," and a "victim. **[*53]** " Br. of Appellant at 75. Because these instructions may be used in a subsequent trial, we analyze the issue.

The instructions are as follows:

> INSTRUCTION NO. 6
>
> A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person when **the victim** is incapable of consent by reason of being physically helpless or mentally incapacitated.

CP at 104 (emphasis added).

> INSTRUCTION NO. 9
>
> Mental incapacity is that condition existing **at the time of the offense** which prevents a person from understanding the nature or consequences of the act of sexual intercourse . . . .

CP at 105 (emphasis added).

> INSTRUCTION NO. 13
>
> It is a complete defense to a charge of rape in the second degree as charged in counts I, II, XII, and XIV, that **at the time of the offense** the defendant reasonably believed that the complainant was not mentally incapacitated or physically helpless.

CP at 106 (emphasis added).

> INSTRUCTION NO. 22
>
> It is not a defense to the charge of sexual exploitation that the defendant did not know the alleged victim's age. However, it is a complete defense to a charge of sexual exploitation **[*54]** as charged in counts III and IV, that **at the time of the offense**, the defendant made a reasonable[,] bona fide attempt to ascertain the true age of [A.] Cruz.

CP at 110 (emphasis added).

> INSTRUCTION NO. 29
>
> A person commits the crime of rape in the third degree when that person engages in sexual intercourse with another person not married to the **perpetrator** when **the victim** did not consent to sexual intercourse with the **perpetrator**, and such lack of consent was clearly expressed by **the victim's** words or conduct.

CP at 114 (emphasis added).

HN14 The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Wash. Const. art. 4, § 16. But an instruction that states the law correctly and is pertinent to the issues raised in the case is not a comment on the evidence. *State v. Johnson*, 29 Wn. App. 807, 811, 631 P.2d 413, *review denied*, 96 Wn.2d 1009 (1981).

Wiatt's claims regarding jury instructions 9, 13, and 22 fail because he proposed similar jury instructions using the term "offense." CP at 273, 274, 277. HN15 Under the doctrine of invited error, **[*55]** even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); *In re Detention of Gaff*, 90 Wn. App. 834, 845, 954 P.2d 943 (1998); *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44, *review denied*, 97 Wn.2d 1018 (1982).

Jury instructions 6 and 29 are the definitions of second and third degree rape. Nothing in the language of these instructions suggests that the jury should assume that a crime was committed. In giving these instructions, the court was not commenting on the evidence, but was merely defining the elements of these crimes.

Third, Wiatt contends that the trial court erred in giving jury instructions 15, 16, and 21, regarding the crime of sexual exploitation of a minor. Counts III and IV of the information charge Wiatt with "aid[ing], invit[ing] or caus[ing] a minor to engage in sexually explicit conduct knowing that such conduct could be photographed." CP at 18. Wiatt claims that the jury instructions permitted him to be convicted under **[*56]** uncharged alternatives: that he committed the crime of sexual exploitation of a minor by "aid [ing], invit[ing], *employ[ing], authoriz[ing]*, or caus[ing] a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed." Br. of Appellant at 70; CP at 107 (emphasis added). The State concedes the errors but argues they were harmless. These errors are of constitutional magnitude and may be challenged for the first time on appeal. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

HN16 When a charging document alleges a statutory alternative means of committing a crime, it is error to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). A defendant cannot be tried for an uncharged offense. *Chino*, 117 Wn. App. at 540. HN17 Where the instructional error favored the prevailing party, we presume it is prejudicial unless it affirmatively appears that the error was harmless. *Chino*, 117 Wn. App. at 540. Error may be harmless if other instructions "clearly and specifically **[*57]** define the charged crime." *Chino*, 117 Wn. App. at 540. In addition, courts have found harmless error where there was no possibility that the defendant was impermissibly convicted on an uncharged alternative. *See State v. Nicholas*, 55 Wn. App. 261, 273, 776 P.2d 1385, *review denied*, 113 Wn.2d 1030, 784 P.2d 530 (1989) (finding harmless error where the jury returned a special verdict finding that the defendant was "armed with a deadly weapon" at the time of the commission of the crime, the charged means of committing the crime). We have recently held in *State v. Spiers*, 119 Wn. App. 85, 94, 79 P.3d 30 (2003), that where no evidence was admitted regarding an alternative method of conviction, instructional error in the "to convict" instruction was mere surplusage, and the conviction did not need to be reversed.

Here, no evidence was offered at trial to show either that Wiatt employed Ms. Cruz to be in the video or that Wiatt had some type of authority that would permit him to authorize Ms. Cruz's appearance in the video. Thus, there was no possibility that the jury convicted Wiatt based on alternative means of committing sexual exploitation **[*58]** of a minor and the error was harmless.

Finally, Wiatt contends that the trial court erred in giving instruction 11. The instruction states: "'Consent' means that at the time of the sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." CP at 105. Wiatt argues that it was error to give this instruction because "[f]reely given consent" was not at issue in his charges of second degree rape and because the instruction misled the jury regarding his charges of third degree rape. Br. of Appellant at 76, 78. Defense counsel objected to the instruction at trial, arguing that the instructions for second degree rape adequately addressed the issue of consent by defining mental incapacity and physical helplessness.

HN18 We review jury instructions in their entirety and find them sufficient if they permit each party to argue its theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *Capers v. Bon Marche*, 91 Wn. App. 138, 142, 955 P.2d 822 (1998), *review denied*, 137 Wn.2d 1002, 972 P.2d 464 (1999). Here, Wiatt was charged with second degree rape by engaging **[*59]** in sexual intercourse when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. Additionally, Wiatt was charged with third degree rape by engaging in sexual intercourse with another who did not, in words or conduct, indicate freely given agreement to have sexual intercourse and such lack of agreement was clearly expressed by the victim's words or conduct. Thus, the State was required to prove, as an element of these crimes, that each victim was incapable of consenting or did not freely consent to sexual intercourse, respectively. RCW 9A.44.050, .060. In giving an instruction on the meaning of "consent" as that term is defined in RCW 9A.44.010, the trial court was properly informing the jury of the applicable law regarding Wiatt's charges of second and third degree rape.

V. Right to Confrontation

Wiatt contends that the trial court violated his right to confrontation by limiting his cross-examination of Lo. At trial, the State moved to prohibit the defense from asking Lo any questions about whether he also had sexual contact with Ms. Cruz or whether he had erased any portion of **[*60]** the video showing that contact, and the court granted the motion. Wiatt argues that the court denied him the ability to question Lo regarding his "greater involvement" in the case and, thus, "the extent of his need to cooperate with the [S]tate to convict Mr. Wiatt." Br. of Appellant at 96. This argument is without merit.

HN19 The Sixth Amendment to the United States Constitution and article I, section 22, of the Washington Constitution, guarantee criminal defendants the right to confront and cross-examine witnesses against them. But the right to cross-examine adverse witnesses is not absolute. *State v. Darden*, 145 Wn.2d 612,

620, 41 P.3d 1189 (2002). A court may, within its sound discretion, deny cross-examination if the evidence sought is vague, argumentative, speculative, or irrelevant. *Darden*, 145 Wn.2d at 620-21. Here, there is no evidence in the record showing either that Lo engaged in sexual contact with Ms. Cruz or that he erased portions of the videotape depicting such contact. Moreover, such a line of questioning would be irrelevant and highly prejudicial to the question of whether Wiatt raped Ms. Cruz. The court did not err.

VI. Prosecutorial **[*61]** Misconduct

Wiatt next asserts that the prosecutor committed misconduct during closing arguments when he essentially argued that "believing these girls" is "legally incompatible" with having a reasonable doubt as to Wiatt's guilt. Br. of Appellant at 87-88. Wiatt is in error.

HN20 In order to establish prosecutorial misconduct, Wiatt must prove that the prosecutor's conduct was improper and that the prosecutor's conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *Dhaliwal*, 150 Wn.2d at 578 (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 135 L. Ed. 2d 1084, 116 S. Ct. 2568 (1996)). HN21 We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578; *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 140 L. Ed. 2d 322, 118 S. Ct. 1192 (1998). **[*62]** A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Wiatt did not object to the prosecutor's statements below. HN22 A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 131 L. Ed. 2d 1005, 115 S. Ct. 2004 (1995). Here, the prosecutor's remarks were not "flagrant" or "ill intentioned," and a curative instruction could have remedied any prejudice to Wiatt.

VII. Violation of Plea Agreement

Wiatt also contends that the prosecutor violated the terms of their plea agreement and, consequently, this court must remand for him to choose whether to withdraw his guilty plea or to enforce the State's agreement. Specifically, Wiatt argues that, contrary to the plea agreement, the prosecutor recommended that the court run his **[*63]** misdemeanor sentences consecutively to his felony sentences. The record does not support this claim. Although the prosecutor argued that the court had the option of running Wiatt's misdemeanor sentences consecutively to his felony sentences, the prosecutor recommended that the misdemeanor charges be sentenced concurrently and that the court impose an exceptional sentence because those charges would not be included in his offender score.

VIII. Exceptional Sentence

Finally, Wiatt contends, both through counsel and pro se in a statement of additional grounds for review (SAG), [8] that his exceptional sentence is unconstitutional under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Specifically, he argues that the court issued an exceptional sentence based on a judicial finding of fact not charged nor found by a jury beyond a reasonable doubt. Because we reverse five counts and remand for trial, the matter of sentencing is not ripe.

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8 RAP 10.10.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

IX. Statement **[*64]** on Additional Grounds for Review

Wiatt raises two issues in his SAG. His claims are meritless.

A. *Jury Instructions*

Wiatt first contends that the trial court erred in giving jury instructions 13, 14, and 33. He argues that instructions 13 and 14 "shift[] the burden of proof as to the state of mind of the plaintiffs at the time of the alleged Rape, from the State to the defendant." SAG at 1. The court's instructions are as follows:

> No. 13
>
> It is a complete defense to a charge of rape in the second degree as charged in counts I, II, XII, and XIV, that at the time of the offense the defendant reasonably believed that the complainant was not mentally incapacitated or physically helpless. This defense must be established by a preponderance of the evidence. If you find that the defendant has established this defense, it will be your duty to return verdicts of not guilty.

CP at 106-107.

> No. 14
>
> When it is said that the defendant has the burden of proof on any proposition by a "preponderance" of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which the defendant has the burden of proof is more probably **[*65]** true than not true.

CP at 107.

Instructions 13 and 14 did not impermissibly shift the burden of proof as to the victims' state of mind. In order to obtain a conviction for second degree rape, the State, not Wiatt, was required to prove that Wiatt engaged in intercourse when the victims were "incapable of consent by reason of being physically helpless or mentally incapacitated." CP at 104. Instructions 13 and 14 define an affirmative defense to this charge, which requires the defendant to prove his, not the victims', state of mind at the time of the offense.

Wiatt also challenges instruction 33. He argues that the court improperly instructed the jury that it could find him guilty of a crime "in which [he] had not been charged." SAG at 2. The instruction states:

> INSTRUCTION NO. 33
>
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

CP at 117.

HN23 In general, the crimes charged in **[*66]** an information are the only crimes for which the defendant may be convicted and on which a jury may be instructed. *State v. McJimpson*, 79 Wn. App. 164, 171, 901 P.2d 354 (1995), *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1996). However, the defendant may be convicted of, and the jury instructed on, a crime that is an inferior degree to the one charged. *McJimpson*, 79 Wn. App. at 171. Here, Wiatt was charged with count X, second degree rape, or in the alternative, third degree rape of H. Kalmikov. Instruction 33 pertained to these charges and properly instructed the jury that it could find Wiatt guilty of the lesser-included crime of attempted third degree rape. The trial court did not

err.

B. *Sufficiency of the Evidence*

Wiatt also contends that insufficient evidence supports his convictions of counts XII, second degree rape of K. Hoskins; count XIV, second degree rape of Z. Hawkins; count XVI, third degree rape of R. Rankis; and count VIII, third degree rape of J. Bowles.

As to counts XII and XIV, Wiatt argues that K. Hoskins and Z. Hawkins were not mentally incapacitated because they had graduated from high school and were not "mentally **[*67]** retarded or severely mentally ill." SAG at 4. Additionally, Wiatt argues that these victims were previously acquainted with him and had accepted an invitation into his home. These claims are entirely without merit. HN24 RCW 9A.44.050(1)(b) does not require any showing of the victim's relation to the defendant or how the victim came to be in proximity to the defendant at the time of the rape. Nor does it require a showing that the victim is mentally ill or handicapped; under RCW 9A.44.010(4), "[m]ental incapacity" may be caused by *the influence of a substance*, illness, defect, or *from some other cause*.

Wiatt further contends that the evidence was insufficient to support a finding that K. Hoskins and Z. Hawkins were mentally incapacitated because they testified that they had only consumed one to three alcoholic beverages prior to the alleged rapes and other witnesses testified that these two possessed mental capacity throughout the evening. Nevertheless, K. Hoskins and Z. Hawkins each testified that they were mentally incapacitated and physically helpless at the time of the rapes-K. Hoskins testified that she consumed one **[*68]** drink and then only remembers waking in Wiatt's bed the following morning and Z. Hawkins testified that she was aware that Wiatt was raping her, but she was unable to physically resist him due to the effects of the alcohol. As noted, HN25 we defer to the trier of fact on issues of witness credibility and conflicting testimony. *See* *Camarillo*, 115 Wn.2d at 71.

Finally, because Wiatt fails to inform the court of the nature and occurrence of the errors involving counts XVI and VIII, we need not address this issue. *See* RAP 10.10(c).

Reversed and remanded as to counts II through VI. Affirmed as to all other counts.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

CONCUR BY: Christine Quinn-Brintnall (In Part)

DISSENT BY: Christine Quinn-Brintnall (In Part)

DISSENT

Quinn-Brintnall, C.J. (concurring in part and dissenting in part) -- I respectfully dissent from that portion of the majority's opinion which reverses counts II through VI based on the conclusion that **[*69]** the videotape found in Wiatt's bedroom must be suppressed. In my opinion, while the portion of the warrant authorizing seizure of the videotape was invalid, the tape was properly seized under the "plain view" rule.

If Washington applied the "totality of the circumstances" test set forth in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), it would be clear that the search warrant in this case validly authorized the seizure of the videotape found in Wiatt's dresser. The *Gates* test requires the issuing

magistrate to make "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. Here, the affidavit in support of the warrant contained the following: Cruz reported being raped by Wiatt in his bedroom; Cruz reported that, a week after the rape, she was "confronted" by friend Smith who had been told that Cruz was caught on videotape being "tag teamed" by two guys; at the time that Smith "confronted" Cruz, Cruz had disclosed the rape only to **[*70]** an aunt; Thoong reported that on the night of the rape, she was told when looking for Cruz, that Cruz had gone into a bedroom with Wiatt and another male; Thoong reported that "she had heard that a guy named Barry said there was a video of [Cruz and Wiatt] doing it 'doggy style;'" [9] and Hoy reported that "Ryan CARLSON told her a couple days after the incident that Jerry WIATT had told another friend, Barry SPECHT, that he had made a video . . . show[ing] WIATT and another male having sexual intercourse with CRUZ." [10] Each of these pieces, when considered together, more than provided a fair probability that a videotape might be found in Wiatt's home.

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[9] CP at 190.

[10] CP at 187-88.

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But Washington follows the *Aguilar-Spinelli* [11] test to determine whether an informant's information establishes probable cause to issue a search warrant. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). This test requires that the affidavit sufficiently establish each informant's credibility **[*71]** and the basis for that informant's information. *Jackson*, 102 Wn.2d at 435.

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[11] *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

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Under the *Aguilar-Spinelli* test, the affidavit was insufficient to support the portion of the warrant authorizing the seizure of the videotape. The information in the affidavit concerning the videotape was through hearsay chains reported by Cruz, Thoong, and Hoy. An informant's information is satisfactory when based on hearsay or several layers of hearsay only if both prongs of the *Aguilar-Spinelli* test are met at every link in the hearsay chain. *People v. Ketcham*, 93 N.Y.2d 416, 421, 712 N.E.2d 1238, 690 N.Y.S.2d 874 (N.Y. 1999); 2 Wayne R. LaFave, Search and Seizure § 3.3(d), at 151-52 (2004). As the majority correctly concludes, the affidavit failed to set forth information which would validate each link in any **[*72]** of the hearsay chains upon which Cruz, Thoong, or Hoy's respective knowledge of a videotape was based.

But, in my opinion, the warrant's invalidity does not require suppression of the videotape. Under the "plain view" rule, items not listed in a search warrant may be seized if the officer has probable cause to believe the item is evidence of a crime. *Arizona v. Hicks*, 480 U.S. 321, 326, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). Thus, an item not named in the warrant may be seized when, "considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence." *State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994); *see also United States v. Castorena-Jaime*, 285 F.3d 916, 924 (10th Cir. 2002) ("A seizing officer need not 'know' or have an 'unduly high degree of certainty' as to the incriminatory character of the evidence under the plain view doctrine;" "[a]ll that is required is a 'practical, nontechnical probability that incriminating evidence is involved.'") (quoting *Texas v. Brown*, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (plurality)). **[*73]** [12]

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12 The requirement that the officer have probable cause to believe that an item is evidence has also been called, as the majority does, the "immediate knowledge" or "immediately apparent" requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (The "plain view" doctrine "is legitimate only where it is immediately apparent to the police that they have evidence before them."). But as the United States Supreme Court has explained: "[T]he use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." *Brown*, 460 U.S. at 741. The Court has repeatedly explained that the "plain view" rule requires only a showing of probable cause. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *Brown*, 460 U.S. at 742.

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[*74] The issuing magistrate, the trial court, and the reviewing members of this court all agree that probable cause supported the warrant's authorization to search Wiatt's home and bedroom for evidence of Cruz's rape. This evidence included bedding, clothing, and the lubricant which Wiatt told Cruz he was using as he raped her. When the police executed the warrant and searched the room where Cruz reported being raped, the police opened a dresser drawer where they discovered the lubricant. Next to the lubricant was a video camera. The question at this point is whether the police, at that moment, had probable cause to believe that the camera, and the tape lying inside, could be evidence of Cruz's rape. Or, to put it another way, could the police have obtained a warrant to seize the video camera and videotape in light of (1) where they found it; (2) what it was in close proximity to; and (3) the hearsay chains reported by Cruz, Thoong, and Hoy. I think the answer to this question is very clearly yes.

What undermined the warrant's authorization to seize the video camera and videotape was the police's inability to set forth the reliability and basis of knowledge for each link in either Cruz, **[*75]** Thoong, or Hoy's reported hearsay chains. But, in such circumstances, the informant's information may still be considered if independent police investigation corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test. *Jackson*, 102 Wn.2d at 438. The independent police work is sufficient if it "tends to give substance and verity to the report that the suspect is engaged in criminal activity." *Jackson*, 102 Wn.2d at 438. This corroboration may be through incriminating or innocuous activity: "[T]he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 245 n.13.

The majority and the trial court correctly stated that "simply having a video camera is not illegal." Majority at 23 (quoting RP (Oct. 4, 2002) at 112). But innocuous activity may ripen to probable cause when the surrounding circumstances are considered. *Gates*, 462 U.S. at 245 n.13; *Hudson*, 124 Wn.2d at 118. Here the police discovered the video camera **[*76]** lying in the room where Cruz reported being raped, next to the lubricant Wiatt told Cruz he used as he raped her. And three separate hearsay chains each indicated that Wiatt had made a video recording of his sexual encounter with Cruz. These reports, while failing the *Aguilar-Spinelli* test, need not be ignored by the investigating officer when given "some further support." *Spinelli*, 393 U.S. at 418. The further support in this case was the presence of a camera reportedly used to film the alleged crime, sitting next to an item which the police undisputedly had probable cause to seize as evidence of that crime.

In this respect, the facts of this case are quite like those in *State v. Bussard*, 114 Idaho 781, 787-88, 760 P.2d 1197 (Idaho Ct. App. 1988). There, officers were executing a search warrant in a burglary case when they came across jewelry which the warrant did not lawfully authorize them to seize. Although the jewelry was nondistinctive, the officers could believe that it was "probably related to criminal activity" because it was sitting next to other stolen property listed in the warrant and the officers had reason to believe that jewelry **[*77]** was taken in the burglary. *Bussard*, 114 Idaho at 788.

The surrounding circumstances of a crime and the search for evidence of it may be considered in assessing the suspicion that attaches to an otherwise innocuous item. The majority relies on this court's decision in

State v. Johnson, 104 Wn. App. 489, 17 P.3d 3 (2001). While *Johnson* may be "instructive," I do not believe it compels the result the majority reaches.

In *Johnson*, an officer obtained a warrant to search the defendant's home after two children reported that they had been sexually abused by the defendant. The warrant authorized a search for a vibrator, which the defendant had allegedly used on one of the children. But the warrant also authorized a search for pornographic materials, even though the children's allegations made no reference to such materials. The officer sought these materials because, in her experience, pornography was often used as an aid in committing sex crimes against children.

This court suppressed two unmarked tapes found in the defendant's home which contained child pornography. In so ruling, we first concluded that the warrant lacked probable cause to search **[*78]** the defendant's home for pornographic materials. This was so because there had been no reference to such material in the case and the officer's general statements regarding the common habits of child abusers was insufficient to establish probable cause. *Johnson*, 104 Wn. App. at 500. We then declined to apply the "plain view" rule because "nothing about the exterior of the tapes gave probable cause to believe the tapes were evidence of a crime." *Johnson*, 104 Wn. App. at 502.

Johnson does not require that probable cause must be established solely on the item's face. Such a holding would be contrary to controlling authority mandating that we consider the items' "surrounding circumstances." *Hudson*, 124 Wn.2d at 118. In *Johnson*, there was no information in the case (other than the officer's generalized predictions about child abusers) which would lead the police to believe that the tape was evidence before they viewed it. The police in this case, however, were aware that Cruz, Thoong, and Hoy reported the existence of a video of the crime. In my view, they had probable cause to believe the tape was evidence when they discovered **[*79]** it sitting next to the lubricant.

The majority cites only Detective Clark's testimony that he was not certain that the tape was evidence until he viewed it. But probable cause, which is the predicate for invoking the "plain view" rule, does not require certainty that an item is evidence. *Brown*, 460 U.S. at 741-42. More importantly, whether an officer subjectively believes that he did or did not have probable cause is irrelevant. The determination of whether probable cause exists is not governed by the officer's subjective intent, but by an objective review of the facts. *State v. Harrell*, 83 Wn. App. 393, 400, 923 P.2d 698 (1996); *State v. Brantigan*, 59 Wn. App. 481, 486, 798 P.2d 1176 (1990).

Under *Aguilar-Spinelli*, Cruz, Thoong, and Hoy's hearsay chains were insufficient to support the warrant's authorization to search Wiatt's home for a video camera. But they ripened to create probable cause when they were corroborated by what the officer found when they discovered the videotape. Finding that a videotape, which had been described in three separate reports, sitting at the scene of a crime and next to an item which had been used **[*80]** in the commission of that crime, corroborated the informant's accounts and they ripened into probable cause to believe that videotape was evidence of the crime described in the search warrant. It can surely be said that the police seized the tape "relying on something more substantial than a casual rumor circulating in the underworld." *Spinelli*, 393 U.S. at 416. Because I would affirm Wiatt's convictions on counts II through VI, I dissent.

QUINN-BRINTNALL, C.J.

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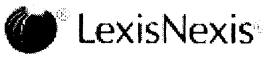
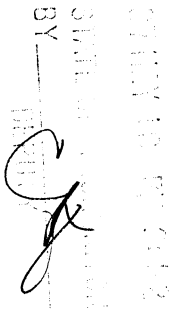


NO. 35690-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent v. JERRY D. WIATT, JR. Petitioner	)	DECLARATION OF MAILING



STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 10th day of May, 2007, I caused to be mailed to the attorney for the Petitioner, DAVID B. ZUCKERMAN, a copy of the Respondent's Response to Personal Restraint Petition, and a copy of the Respondent's Motion to Allow Filing of Over-Length Response to

Personal Restraint Petition, addressing said

envelope as follows:

David B. Zuckerman
Attorney at Law
Suite 1300 Hoge Building
705 Second Avenue
Seattle, WA 98104

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 16th day of May, 2007 at Olympia, WA.

James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney